ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

IN

CRIMINAL CASES.

Fourth Edition.

WITH CONSIDERABLE ADDITIONS

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ADVERTISEMENT TO THE FOURTH EDITION.

In preparing the fourth edition of this work for the press, I have endeavoured to make it as useful and complete a manual as possible of the branch of law of which it treats. Where important principles have been laid down by the Court of Criminal appeal, they will be found stated in the very language used by the Judges. I may refer to the learned and elaborate judgment of Baron Parke in *Thurburn's case* (post, p. 581), upon the law of larceny where goods come into possession of a person by finding, as an example.

The statutes 14 & 15 Vict. c. 19, "an Act for the better prevention of offences;" the 14 & 15 Vict. c. 100, "an Act for the further improving the administration of criminal justice;" the 16 & 17 Vict. c. 99, "an Act to substitute in certain cases other punishment in lieu of transportation;" and the 18 & 19 Vict. c. 126, "an Act for diminishing expense and delay in the administration of criminal justice in certain cases;" are so constantly referred to in practice, that I have thought it would be convenient to insert them at length in an appendix.

D. P.

Temple,
Feb., 1857.

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ADDENDA ET CORRIGENDA.

Page 304, line 9, *for* "6 & 7 W. 4. c. 95," *read* "6 & 7 W. 4, c. 85."
,, line 26, *insert* as follows:—

By the new statute, 19 & 20 Vict. c. 119, which came into operation on the 1st of January, 1857, and which recites the 6 & 7 W. 4, c. 85, the 1 Vict. c. 22, and 3 & 4 Vict. c. 72, and alters and amends the provisions of those statutes, it is enacted by sect. 17 that, "after any marriage shall have been solemnised under the authority of any of the recited Acts or of this Act, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling, or of the period of dwelling, of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnised had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties; nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been, or which hereafter may be had or solemnised under the authority of any of the said recited Acts, or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the said Act passed in the sixth and seventh years of his late Majesty King William the Fourth, chapter eighty-five, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified."

Page 572, 3rd line from bottom, *for* "18 & 19 Vict. c. 122," *read* "18 & 19 Vict. c. 196."

A DIGEST, &c.

THE general rules of evidence are the same in criminal and in civil proceedings. "There is no difference as to the rules of evidence," says Abbott, J., "between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." *Watson's case*, 2 *Stark. N. P. C.* 155; *Murphy's case*, 8 *C. & P.* 306. The enactments, however, of the Common Law Procedure Act, 1854, which materially altered the rules of evidence in certain cases, are, by sect. 102, confined to courts of civil judicature.

PRIMARY AND SECONDARY EVIDENCE.

IT is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. *Gilb. Ev.* 3. *Bull. N. P.* 293, *per Jervis, C. J.*, in *Twynam* v. *Knowles*, 13 *C. B.* 224.

Primary evidence—written instruments.]—As a general rule, the contents of a written instrument can only be proved by the production of the instrument itself, parol evidence of them being of a secondary or inferior nature. But this rule is not without many exceptions. In general, whenever an instrument is entered into in

writing, which is intended by the parties (testified by their signatures) to contain and to be the evidence of their consent or agreement, or whenever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, that instrument or document is regarded as the best evidence of the agreement or facts which it records; and unless it be in the possession of the opposite party, and notice has been given to him to produce it, or it be proved to be lost or destroyed, secondary evidence of its contents is not admissible. Thus, where a man makes a will of lands, which must necessarily be in writing, both the devisor and the law intend that that writing shall be the evidence of the devisor's intentions, and therefore the will itself must be produced; neither an exemplification under the great seal, nor a probate, or other copy being primary evidence of the devise. *B. N. P.* 246. In the same manner where two parties enter into an agreement in writing, that writing is intended by them to be the evidence of their mutual consent, and is the only primary evidence of that consent. *Brewer* v. *Palmer*, 3 *Esp.* 213.

Where upon an indictment for setting fire to a house, in order to prove that the house was insured, the books of the insurance office were produced, in which there was an entry to that effect; Lord Kenyon ruled, that as the policy was the best evidence, the prosecutors could not give any evidence from their books, it being inferior evidence, unless notice had been given to produce the policy. *Doran's case*, 1 *Esp.* 127. *Reg.* v. *Kitson*, 1 *Dear. C. C. R.* 187. *S. C.* 22. *L. J. M. C.* 118.

Upon the same principle, the records and proceedings of courts of justice, existing in writing, are primary evidence of the facts there recorded. Thus where it was necessary to prove the day on which a cause came on to be tried, Lord Ellenborough said that he could not receive parol evidence of the day on which the court sat at nisi prius, as that was capable of other proof by matter of record. *Thomas* v. *Ansley*, 6 *Esp.* 80. *Vide post, Documentary Evidence.* So on an indictment for disturbing a protestant congregation, Lord Kenyon ruled that the taking of the oaths under the toleration act, being matter of record, could not be proved by parol evidence. *Hube's case*, *Peake*, 132. On an indictment under the statute 8 & 9 Wm. 3, c. 26, 81, for having coining instruments in possession, it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor was the warrant of commitment or the depositions before the magistrate given in evidence to show on what transactions, or for what offence or at what time, the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held, that there was not sufficient evidence that the prisoners were apprehended upon transactions for high treason respecting the coin, within three months after the offence committed. *Phillip's case*, *Russ. & Ry. C. C. R* 369. Where the deposition of a witness in a case of misdemeanor, was taken under the 7 Geo. 4, c. 64, s. 3, and the plaintiff in an action against the witness, offered parol evidence of an admission made by him in such deposition, the court held that the evidence was rightly rejected. *Leach* v. *Simpson*, 5 *M. & W.* 309.

So where the transactions of courts which are not, technically speaking, of record, are to be proved, if such courts preserve written

memorials of their proceedings, those memorials are the only authentic modes of proof which the law recognises. 3 *Stark. Ev.* 1043, 1*st ed.*

Although matters of record and proceedings of courts of justice, when committed to writing, cannot be proved by parol, they may be proved by examined copies, a rule founded upon a principle of general convenience. In the same manner examined copies of *public* books are admissible without producing the originals. *Vide post.* But no such rule exists with regard to private documents, there being no inconvenience in requiring their production.

If oral evidence of an agreement be given, the witness may be asked in cross-examination, whether it is not in writing, and as to its contents, in order to show that parol evidence is inadmissible. *Curtis* v. *Greated*, 1 *A. & E.* 167.

But the admissions of a party to the suit, and his acts amounting to admissions, are receivable as primary proof against himself and those claiming under him, although they relate to the contents of a deed or other instrument. *Slatterie* v. *Pooley*, 6 *M. & W.* 669. The reason, says Parke, B., in giving judgment, "why such statements or acts are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so." See also *R.* v. *Welch*, 1 *Den. C. C.* 199; *King* v. *Cole*, 2 *Ex. R.* 632; *Boulter* v. *Peplow*, 9 *C. B.* 501; and *Taylor on Evidence, 2nd ed.*, 356. *Bloxam* v. *Elsie, Ry. & Moo.* 187, must now be considered as overruled.

It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced. Thus where a memorandum of agreement was drawn up, and read over to the defendant, which he assented to, but did not sign, it was held that the terms mentioned in it might be proved by parol. *Doe* v. *Cartwright*, 3 *B. & A.* 326; *Trewhitt* v. *Lambert*, 10 *A. & E.* 470. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but is not signed by the vendor, it may be proved by parol. *Dalison* v. *Stark*, 4 *Esp.* 163. So facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took. *Rambert* v. *Cohen*, 4 *Esp.* 213. So where, in trover, to prove the demand, the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was unnecessary to produce the writing. *Smith* v. *Young*, 1 *Camp.* 439. So a person who takes notes of a conversation need not produce them in proving the conversation. Thus in *Layer's case* for high treason, Mr. Staney, an under-secretary of state, gave evidence of the prisoner's confession before the council, though it had been taken down in writing. 12 *Vin. Ab.* 96. And although what is said by a prisoner whose examination is regularly taken (*vide post*) cannot be proved by parol, yet it may be so proved where the written examination is inadmissible on account of an irregularity in the mode of taking it. *Reed's case, Moo. & Mal.* 403. Or where the magistrate is not bound to take

down what is said. *Robinson* v. *Vaughton*, 8 *C. & P.* 252. So on an indictment for perjury committed upon a trial in the county court, any witness, present at the time, is competent to prove what took place, inasmuch as a county court judge is not bound to take any notes. *R.* v. *Morgan*, 6 *Cox*, *Cr. C.* 107, *per Martin*, *B.* *Harmer* v. *Bean*, 3 *C. & K.* 307, *per Parke*, *B.* So the fact of a marriage may be proved by a person who was present, and it is not necessary to produce the parish register as the primary evidence. *Morris* v. *Miller*, 1 *W. Bl.* 632. So the fact that a certain person occupied land as tenant may be proved by parol, although there is a written contract. *R.* v. *Inhab. of Holy Trinity*, 7 *B. & C.* 611; 1 *M. & R.* 444. But the parties to the contract, the amount of rent, and the terms of the tenancy can only be shown by the writing. *S. C. and Strother* v. *Burr*, 5 *Bing.* 136; *Doe* v. *Harvey*, 8 *Bing.* 239; *R.* v. *Merthyr Tidvil*, 1 *B. & Ad.* 29.

Where on an indictment for unlawfully assembling, the question was, what were the inscriptions and devices on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible without producing the banners themselves; and *per Lord Tenterden*, "Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings." *Hunt's case*, 3 *B. & A.* 566. So the inscription on a monument may be proved by parol. *Doe* v. *Cole*, 6 *C. & P.* 359. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced. *Jones* v. *Tarleton*, 9 *M. & W.* 675.

In the case of *printed* documents, all the impressions are originals, or in the nature of duplicate originals, and any copy will be primary evidence. Thus where, on a prosecution for high treason, a copy of a placard was produced by the person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's, and taken away twenty-five copies, it was objected, that the original ought to be produced, or proved to be destroyed, or in the possession of the prisoner: but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies; and that being taken out of a common impression, they must be supposed to agree in the contents. "If the placard," said Mr. Justice Bayley, "were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must be all the same." *Watson's case*, 2 *Stark. N. P.* 130. *Semble*, that parol evidence is admissible of a printed paper affixed to a wall (cautioning persons not to attend an illegal meeting), and, that it is unnecessary to produce the original manuscript. The usual way in such cases is to give a copy to the witness, and ask him if it is a copy of what he saw. *Per Gaselee, J. and Park, J.*, *Fursey's case*, 6 *C. & P.* 81.

The transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. Thus where, in a prosecution against Hunt for an unlawful assembly, in order to prove the reading of certain resolutions, a witness produced a copy of the resolutions which had been delivered to him by Hunt as the resolutions intended to be proposed, and proved that the resolutions he heard read, corresponded with that copy;

this was held sufficient, though it was objected that the original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. *Hunt's case*, 3 *B. & A.* 568. In a prosecution on the Irish convention act, the indictment averred that divers persons assembled together, and intending to procure the appointment of a committee of persons, entered into certain resolutions respecting such committee, and charged the defendant with certain acts done for the purpose of assisting in forming that committee, and carrying the resolutions into effect. To prove the first averment, a witness was called, who stated, that at a general meeting (the defendant not being present) the secretary of the meeting proposed a resolution, and read it from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the majority of the court were of opinion that this was not a case to which the distinction between primary and secondary evidence was strictly applicable; that the proposed evidence was intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. *Sheridan & Kirwan's case*, 31 *How. St. Tr.* 672.

Primary Evidence—handwriting.] In proving handwriting the evidence of third persons is not inferior to that of the party himself. "Such evidence," says Mr. Phillipps, "is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means, as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true." 1 *Phill. Ev.* 212, *6th ed.*

If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or not *genuine* being the same in both cases. But see 1 *Phill. Ev.* 213, *6th ed.* Accordingly, although in an early case, where it was requisite to prove that certain alterations in a receipt were forged, it was held that the party who had written the receipt ought to be called as the best and most satisfactory evidence; *Smith's case, O. B.* 1768, 2 *East, P. C.* 1000; yet in subsequent cases of prosecutions for forgery, it has been held that the handwriting may be disproved by any person acquainted with the genuine handwriting. *Hughes's case*, 2 *East, P. C.* 1002. *M'Guire's case, Id.* So in *R.* v. *Hurley*, 2 *Moo. & Rob.* 473, it was held that the person whose name was alleged to have been forged need not be called, either to disprove the handwriting, or to show that he did not authorise any other person to use his name.

On certain indictments for putting away bank of England notes, knowing them to be forged, &c. the counsel for the bank thought proper, over and above the usual proof given by the bank inspector of the note being forged (*viz.* of its not being bank paper, nor a bank

impression, and that he was acquainted with the handwriting of the clerk whose name appeared to the note, and that he believed it not to be his handwriting) to go further, and produce the clerk himself to prove that he never signed it. This appeared to be done upon some intimation that the jury would not be satisfied without the best proof the nature of the case would admit of, and *that* was the signing clerk himself, who was a competent witness. The following questions were submitted for the opinion of the judges. Is it necessary that the signing clerk, if living, should be produced? And if a jury should require his testimony, and it is not produced, what direction should the judge give? The judges were of opinion that it was unnecessary to produce the signing clerk to show that he never signed the notes, if it were established by the evidence of persons acquainted with his handwriting, that the signature was not in his handwriting. *Case of Bank prosecutions*, 1 *Moody*, *C. C.* 380.

Primary evidence—negative evidence of consent.] In certain prosecutions, it is necessary to prove that the act with which the prisoner is charged was done without the consent, or against the will, of some third person; and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time, it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where on an indictment under 6 Geo. 3, c. 36, for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say, (who had died before the trial, having given orders for apprehending the prisoners on suspicion,) he believed that he never did: Bayley, J., left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given. The prisoners were found guilty. *Hazy's case*, 2 *C. & P.* 458. So on an indictment on 42 Geo. 3, c. 107, s. 1, for killing fallow-deer without consent of the owner, and on two other indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed under such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called; but not the owners. The judges held the convictions right. *Allen's case*, 1 *Moo. C. C.* 154.

Primary evidence—exceptions—persons acting in a public capacity.] Where persons, acting in a public capacity have been appointed by instruments in writing, those instruments are not considered the primary evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without producing their appointments; and this even in the case of murder. *Per Buller, J.*, *Berryman* v. *Wise*, 4 *T. R.* 366. *Gordon's case*, 1789, *cited ib.* So, where on an indictment for perjury in an answer to an allegation in the ecclesiastical court, in order to prove that the person by whom the oath was administered, was a surrogate, evidence was

given of his having been in the habit of acting in that capacity, Lord Ellenborough said, "I think the fact of his having acted as surrogate is sufficient *primâ facie* evidence that he was duly appointed, and had competent authority to administer the oath. I cannot, for this purpose, make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do." *Verelst's case*, 3 *Campb.* 432. So where an affidavit purported to be sworn before a commissioner, proof of his having acted as such was held by Patteson, J., to be sufficient. *Howard's case*, 1 *Moo. & Rob.* 187. In an action on an attorney's bill, it was proved by the defendant that the plaintiff was admitted an attorney of the King's Bench in 1792, and had ceased for more than one year to take out his certificate; it was contended that it lay upon him to prove his re-admission, but it was held, as he had proved that he had acted as an attorney of the Common Pleas in 1824, that it was to be presumed he had lawfully acted in that character, in that court, till the contrary was shown. *Pearce* v. *Whale*, 5 *B. & C.* 38. So where the directors and overseers of a parish were by a local act to sue and be sued in the name of their vestry clerk, it was held, that proof of the latter having acted as vestry clerk was sufficient *primâ facie* evidence of his being regularly appointed such clerk. *M'Gahey* v. *Alston*, 2 *M. & W.* 211. So of an attested soldier engaged in the recruiting service. *Walton* v. *Gavin*, 16 *Q B.* 48.

Primary evidence—exceptions—admissions by party.] Where a party is charged as bearing some particular character, the fact of his having acted in that character will be sufficient evidence, as an admission, without reference to his appointment being in writing. Thus in an action for penalties against a collector of taxes, under 43 Geo. 3, c. 99, s. 12, the warrant of appointment was not produced, it being held that the act of collecting the taxes was sufficient to prove him to be collector. *Lister* v. *Priestly*, *Wightw.* 67. So on an information against an officer, for receiving pay from government for a greater number of men than had mustered in his corps, Lord Ellenborough held, that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant of the corps, without adducing direct evidence of his appointment by the king. *Gardner's case*, 2 *Campb.* 513. So in an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the church, will be evidence that he is parson without formal proof of his title. *Bevan* v. *Williams*, 3 *T. R.* 635, (*a*). *Smith* v. *Taylor*, 1 *Bos. & Pul. N. R.* 210. Again, upon an indictment against a letter-carrier for embezzlement under 2 Wm. 4, c. 4, proof that he acted as such was held to be sufficient, without showing his appointment. *Borett's case*, 6 *C. & P.* 124.

In the same manner, where the appointment or particular character of the other party is to be proved, the admission of the party against whom the evidence is offered, will not be secondary evidence, although the appointment be in writing. Thus in an action for penalties on the post-horse act, brought by the farmer of the tax, it was held, not to be necessary for the plaintiff to give in evidence his appointment by the Lords of the Treasury or the Commissioners of the stamp duties; proof that the defendant had accounted with him as farmer of the duties, being sufficient. *Radford* v. *M'Intosh*, 3 *T. R.* 632. See *Smith* v. *Taylor*, 1 *Bos. & Pul. N. R.* 211. So in an action for

slandering the plaintiff in his profession of an attorney, the words being, "that the defendant would have him struck off the roll," &c., it was held that this was an admission by the defendant, that the plaintiff was an attorney, and sufficient evidence of that fact. *Berryman* v. *Wise*, 4 *T. R.* 366. The rule is thus stated by Heath, J., in *Smith* v. *Taylor*, 1 *Bos. & Pul. N. R.* 208. "Where a defendant, in the course of the transaction on which the action is founded, has admitted the title by virtue of which the plaintiff sues, it amounts to *primâ facie* evidence that the plaintiff is entitled to sue."

Secondary evidence—when admissible in general.] It is an established rule that all originals must be accounted for, before secondary evidence can be given of any one. *Alivon* v. *Furnival*, 4 *Tyrwh.* 767; 1 *C., M. & R.* 292, *S. C.* Secondary evidence is admissible, where the primary evidence, being documentary, is either lost or destroyed; or where it is in the hands of the opposite party, or of his privy or agent; or it is in the hands of a person privileged from producing it, and who being required to do so, insists upon his privilege; *Marston* v. *Downes*, 6 *C. & P.* 381; 1 *A. & E.* 31, *S. C.*; *Doe* v. *Ross*, 7 *M. & W.* 112; in which latter case the court suggested that where an attorney refuses to produce a document on the ground of privilege, it may perhaps be necessary to show that his client also objects to its production. See also *Newton* v. *Chaplin*, 10 *C. B.* 356. But if the attorney positively swears that his client has instructed him not to produce the instrument, the client need not be subpœnaed. *Phelps* v. *Prew*, 3 *E. & B.* 430. So secondary evidence is admissible where, as in the case of tablets let into walls, it is impossible to produce the original in court without great inconvenience; or where the original is in a foreign country and is not legally removable from its place of deposit. *Alivon* v. *Furnival*, 4 *Tyrwh.* 751; 1 *Cr., M. & R.* 277. See *Boyle* v. *Wiseman*, 10 *Ex. R.* 647. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced. *Jones* v. *Tarleton*, 9 *M. & W.* 675. The refusal of a third person to produce a document in his possession on subpœna, which he is not justified in withholding, will not let in parol evidence of its contents; the only remedy of the party is by an action against him. *Jesus College* v. *Gibbs*, 1 *Y. & Coll.* 156; *R.* v. *Llanfaethly*, 2 *E. & B.* 940; 23 *L. J. M. C.* 33, *S. C.* When a copy of an attested instrument is produced as secondary evidence, the attesting witness need not be called. *Poole* v. *Warren*, 8 *A. & E.* 582.

Secondary evidence—notice to produce—in general.] Where a document is in the hands of the other party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents. *Dwyer* v. *Collins*, 7 *Ex. R.* 639. There is no distinction between civil and criminal cases, with regard to the production of documents after notice given to produce them, and with regard to the admissibility of secondary evidence in case of their non-production. *Le Merchand's case, coram Eyre, B.*, 1 *Leach*, 300 (*n*). In *Layer's case* for high treason, it was proved by a witness, that the

prisoner had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it in his pocket; and no objection was made to the witness giving parol evidence of the paper. 6 *State Trials*, 229 (*fo. ed.*); 16 *Howell's St. Tr.* 170, *S. C.* *Francia's case*, 15 *Howell's St. Tr.* 941.

A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner under such circumstances, as that it might be presumed to have come to his own hands. Colonel Gordon was indicted for the murder of Lieut.-Colonel Thomas in a duel. The letter from Gordon containing the challenge was carried by Gordon's servant, and delivered to Thomas's servant, who brought a letter in answer, and delivered it to Gordon's servant; but it did not appear in fact, that the letter was ever delivered to Gordon himself. Mr. Baron Eyre permitted an attested copy of the latter letter to be read against the prisoner, and left it to the jury as legal evidence, if they were of opinion that the original had ever reached the prisoner's hands. Hotham, B., concurred; but Gould, J., thought that positive evidence ought to be given that the original had come to the prisoner's hands. *Gordon's case, O. B.* 1784, 1 *Leach*, 300 (*n*). Where a prisoner's attorney produced a deed as part of the evidence of his client's title upon the trial of an ejectment, in which the prisoner was lessor of the plaintiff, and the deed was delivered back to the attorney when the trial was over, it was held to be in the prisoner's possession, and the prisoner not producing it in pursuance of notice, secondary evidence of its contents was received. *Per Vaughan, B., Hunter's case*, 4 *C. & P.* 128. But in order to render a notice to produce available, the original instrument must be shown to be in the possession of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between the defendant and a third party, a notice to produce will not let in secondary evidence of its contents. *Parry* v. *May*, 1 *Moo. & R.* 279. See also *Laxton* v. *Reynolds*, 18 *Jur.* 963, *Exch.*

The question whether there is sufficient proof of possession in the opposite party, is solely for the judge; and where a notice to produce is given by the plaintiff, the defendant may interpose, with evidence to disprove possession, and such evidence gives the plaintiff no reply to the jury. *Per Parke, B., Harvey* v. *Mitchell*, 2 *Moo. & R.* 366.

Secondary evidence—notice to produce—when dispensed with.] Where from the nature of the prosecution the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary. Thus upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given, without any proof of a notice to produce. *Aickles' case*, 1 *Leach*, 294; 2 *East, P. C.* 675. So upon an indictment for forging a note, which the prisoner afterwards obtained possession of and swallowed, Buller, J., permitted parol evidence of the contents of the note to be given without any notice to produce. *Spragge's case, cited* 14 *East*, 276. But see *R.* v. *Haworth*, 4 *C. & P.* 254. In the case of De la Motte, indicted for high treason, his correspondence was secretly opened, copies of the contents taken, and the originals sealed again, and forwarded to the place of destination. The original letters having been proved to be written by the prisoner, the copies proved

to be examined were admitted in evidence. *De la Motte's case*, 1 *East, P. C.* 124. So upon the trial of an indictment for administering an unlawful oath, it may be proved by parol that the prisoner read the oath from a paper, although no notice to produce that paper has been given. *Moor's case*, 6 *East*, 419 (*n*). *Hunt's case*, 3 *B. & A.* 568, *ante, p.* 5. In a case of forgery, where the prisoner was proved to have said that he had destroyed the forged deed upon which the charge was founded, it was held to be unnecessary (*per* Parke, J.) to prove any notice to produce the deed, so as to let in secondary evidence of its contents. *Haworth's case*, 4 *C. & P.* 254.

But an indictment for setting fire to a dwelling-house with intent to defraud an insurance office, is not such a notice to the prisoner as will dispense with a notice to produce the policy of insurance, so as to allow the prosecutor to give secondary evidence of its contents. *Ellicombe's case*, 5 *C. & P.* 522; 1 *Moo. & R.* 260, *S. C. post, p.* 11. *R.* v. *Kitson*, 1 *Dear. C. C. R.* 187, *S. C.* 22 *L. J. M. C.* 118.

A notice to produce is not requisite where the document tendered in evidence is a duplicate original; *per Lord Ellenborough, Philipson* v. *Chace*, 2 *Camp.* 110; *per Bayley, J., Colling* v. *Treweek*, 6 *B. & C.* 398; or a counterpart; *Burleigh* v. *Stibbs*, 5 *T. R.* 465. *Roe d. West* v. *Davis*, 7 *East*, 363. *Mayor of Carlisle* v. *Blamire*, 8 *East*, 487. Or where the instrument to be given in proof is a notice, as a notice of action; *Jory* v *Orchard*, 2 *B. & P.* 39; a notice of the dishonour of a bill of exchange; *Keene* v. *Beaumont*, 2 *B. & P.* 288; or a notice to quit; 2 *B. & P.* 41. Nor is a notice to produce necessary where the party has fraudulently or forcibly obtained possession of the document, as from a witness in fraud of his subpœna *duces tecum*. *Goodered* v. *Armour*, 3 *Q. B.* 956.

It is sufficient to dispense with a notice to produce, that the party in possession of the document has it with him in court. *Dwyer* v. *Collins*, 7 *Ex. R.* 639, overruling *Bate* v. *Kinsey*, 1 *Cr., M. & R.* 38.

Secondary evidence—notice to produce—form of.] It is not necessary that a notice to produce should be in writing; and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone. *Smith* v. *Young*, 1 *Campb.* 440; 2 *Russell*, 677. The notice, if a written one, must be properly entitled. *Harvey* v. *Morgan*, 2 *Stark. N. P.* 17. But in a recent case, *Lawrence* v. *Clark*, 14 *M. & W.* 251, where the notice was objected to on the ground that it was entitled by mistake in a wrong court, Alderson, B., said, "One does not know where we are to stop. Would the notice be bad if one of the names were spelt wrong? At the time of the decision in *Harvey* v. *Morgan*, the Courts were much more strict than now as to matters of this nature."

In order to render it effective the notice should sufficiently point out the document required to be produced. Where, under a notice to produce "all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration," the party served was called upon to produce a particular letter, Best, C. J., was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required. *France* v. *Lucy*, *Ry. & Moo. N. P. C.* 341; see also *Jones* v. *Edwards*, *M'Cl. & Y.* 149. But a notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action;" *Jacob* v. *Lee*, 2 *Moo. & R.* 33; or "all letters written to and received by plaintiff between 1837 and 1841, both inclusive, by and from the defendants,

or either of them, and all papers, &c., relating to the subject matter of this cause;" *Morris* v. *Hanson*, 2 *Moo.* & *R.* 392; has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. And see *Rogers* v. *Custance*, 2 *Moo.* & *R.* 179.

Secondary evidence—notice to produce—to whom and when.] In criminal as well as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney. *Cates, q. t. v. Winter*, 3 *T. R.* 306; *M'Nally on Ev.* 355; 2 *T. R.* 203 (*n*); 2 *Russell*, 678. And it may be left with a servant of the party at his dwelling-house. *Per Best, C. J., Evans* v. *Sweet*, *R.* & *M.* 83. It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each particular case. The prisoner was indicted for arson. The commission-day was the 15th of March, and the trial came on upon the 20th. Notice to produce a policy of insurance was served on the prisoner in gaol upon the 18th of March. His residence was ten miles from the assize town. It being objected that this notice was too late, Littledale, J., after consulting Parke, J., said, "We are of opinion that the notice was too late. It cannot be presumed that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think, that secondary evidence of the policy cannot be received." *Ellicombe's case*, 5 *C.* & *P.* 522; 1 *Moo.* & *R.* 260, *S. C.* *Haworth's case*, 4 *C.* & *P.* 254, *S. P.* So where the notice to produce a policy of insurance was given to the prisoner in the middle of the day preceding the trial, the prisoner's residence being thirty miles from the assize town, it was held to be too late. *R.* v. *Kitson*, *Dears.* *C. C. R.* 187; *S. C.* 22 *Law J. M. C.* 118. Notice served on the attorney at his office on the evening before the trial, at half-past seven, was held by Lord Denman, C. J., to be insufficient to let in secondary evidence of a letter in his client's possession. *Byrne* v. *Harvey*, 2 *Moo.* & *R.* 89; and see also *Lawrence* v. *Clark*, 14 *M.* & *W.* 250.

The notice should be served before the commission-day, when the party does not live at the assize town. 1 *Moo.* & *R.* 259. And see also *Doe* v. *Spitty*, 3 *B.* & *Ad.* 182. Service of a notice on a Sunday is bad: *Per Patteson, J.*, in *Hughes* v. *Budd*, 8 *Dowl.* *P. C.* 315.

Secondary evidence—consequences of notice to produce.] The only consequence of giving a notice to produce, is that it entitles the party giving it, after proof that the document in question is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, but does not authorize any inference against the party failing to produce it. *Cooper* v. *Gibbons*, 3 *Campb.* 363. It would seem, however, that the refusal to produce is matter of observation to the jury. *Semb. per Lyndhurst, C. B.*; 4 *Tyrwh.* 662; 1 *Cr., M.* & *R.* 41. But see *Doe* v. *Whitehead*, 8 *A.* & *E.* 671.

If a party to the suit refuses to produce a document when called on, he cannot afterwards produce it as his own evidence; *Laxton* v. *Reynolds*, 18 *Jur.* 963 *Ex.*; and if the defendant refuses to produce a document, and the plaintiff is thereby compelled to give secondary evidence of its contents, the defendant cannot afterwards produce it as part of his own case, in order to contradict the secondary evidence. *Doe* v. *Hodgson*, 12 *Ad.* & *E.* 135. If he calls for papers, and

inspects them, they will be rendered evidence for the opposite party. *Wharam* v. *Routledge*, 5 *Esp.* 235. *Wilson* v. *Bowie*, 1 *C.* & *P.* 10. Though it is otherwise, if he merely calls for them without inspecting them. *Sayer* v. *Kitchen*, 1 *Esp.* 210. Secondary evidence of papers cannot be given until the party calling for them has opened his case, before which time there can be no cross-examination as to the contents. *Graham* v. *Dyster*, 2 *Stark. N. P.* 23. As against a party who refuses, on notice, to produce a document, it will be presumed that it bore the requisite stamp, but the party refusing is at liberty to prove the contrary. *Crisp* v. *Anderson*, 1 *Stark. N. P.* 35.

Secondary evidence—loss of document.] Where the original of a document is proved to be lost or destroyed, secondary evidence of its contents may be given in criminal as well as in civil proceedings. Thus upon an indictment for false pretences contained in a letter, upon proof of the loss of the letter, parol evidence of its contents is admissible. *Chadwick's case*, 6 *C.* & *P.* 181. Before secondary evidence can be given of any document, evidence that the original once existed (*Doe* v. *Wittcomb*, 6 *Ex. R.* 601) and of its loss must be offered, and it must be shown that due diligence has been exercised in searching for it. The degree of diligence will necessarily depend on the particular case. Where, on a prosecution for a libel, the publisher of a paper in which the libel had been inserted, stated that he believed the original was either destroyed or lost, having been thrown aside as useless; this was held sufficient to let in secondary evidence. *Johnson's case*, 7 *East*, 66. See also *Boyle* v. *Wiseman*, 10 *Exch.* 647. *S. C.* 24 *L. J. Ex.* 160.

The degree of diligence to be exercised in searching for a document, will depend in a great measure on the importance of the document. *Gully* v. *Bp. of Exeter*, 4 *Bingh.* 298. *Gathercole* v. *Miall*, 15 *M.* & *W.* 319—335. In the case of an useless document, the presumption is that it has been destroyed. *Per Bayley, J.*, *The King* v. *East Farleigh*, 6 *D.* & *R.* 153. And where the loss or destruction of a paper may almost be presumed, very slight evidence of such loss or destruction is sufficient. *Per Abbott, C.J.*, *Brewster* v. *Sewell*, 3 *B.* & *A.* 296. Thus where depositions have been delivered to the clerk of the peace or his deputy, and it appears that the practice is, on a bill being thrown out, to put away the depositions as useless, slight evidence of a search for them is sufficient, and the deputy need not be called, it being his duty to deliver the depositions to his principal. *Freeman* v. *Arkell*, 2 *B.* & *C.* 496.

Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is, that it is lost or destroyed. *The King* v. *Stourbridge*, 8 *B.* & *C.* 96; 2 *M.* & *R.* 43, *S. C.* Where an attorney or officer is applied to for documents the court will assume till the contrary is proved, that all the documents relating to the subject of inquiry are produced. *M'Gahey* v. *Alston*, 2 *M.* & *W.* 213. See upon this point, *R.* v. *Saffron Hill*, 1 *E.* & *B.* 93; *S. C.* 22 *Law J. M. C.* 22.

When the document was in the possession of a party who is dead, his declarations as to its loss or destruction, are admissible after his death. *Rex* v. *Morton*, 4 *M.* & *S.* 48. See *Rex* v. *Piddlehinton*, 3 *B.* & *Ad.* 460. But where it did not appear that an indenture had been in the possession of the deceased, his declarations as to its loss, were held inadmissible. *Rex* v. *Rawden*, 2 *A.* & *E.* 156. Where

the party in whose possession the instrument was, is alive, his declarations are inadmissible, and he ought to be called as a witness. *Rex* v. *Denio*, 7 *B. & C.* 620. *Parkins* v. *Cobbett*, 1 *C. & P.* 282. But see *R.* v. *Kenilworth*, 7 *Q. B.* 642.

The preliminary question of fact upon which the admissibility of the evidence depends is, for the decision of the judge, not of the jury. Therefore, where a party who had made a *primâ facie* case for the reception of secondary evidence of a document, proceeded to prove its contents by the parol evidence of a witness who had seen the original, on which the opposite party interposed, and showing a document to the witness, asked him if that was the original, which the witness denied; it was held that the judge was bound to decide the collateral question, whether the document thus offered was the original or not, and upset or receive the secondary evidence accordingly. *Boyle* v. *Wiseman*, 1 *Jur. N. S.* 894.

As to degrees of secondary evidence.] In *Brown* v. *Woodman*, 6 *C. & P.* 206, it was said by Parke, J., that there are no degrees of secondary evidence; and he held that a defendant might give parol evidence of the contents of a letter, of which he had kept a copy, and that he was not bound to produce the copy. So where two parts of an agreement were prepared but one only was stamped, which was in the custody of the defendant, who, on notice, refused to produce it, the court ruled that the plaintiff might give the draft in evidence, without putting in the part of the agreement which was unstamped. *Gamons* v. *Swift*, 1 *Taunt.* 507. *Doe* v. *Ross*, 7 *M. & W.* 102; *Hall* v. *Ball*, 3 *M. & Gr.* 242. The copy of a copy is not secondary evidence of the original. *Everingham* v. *Roundill*, 2 *Moo. & R.* 138. *Liebman* v. *Pooley*, 1 *Stark. N. P.* 168, *per Lord Ellenborough.*

PRESUMPTIONS.

General nature of presumptive evidence—and when admissible.] "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning." *Per Abbott, C. J., Rex* v. *Burdett*, 4 *B. & A.* 161. When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and these are called *presumptions* and not *proofs;* for they stand instead of the proofs of the fact till the contrary be proved. *Gilb. Ev.* 157. The instance selected by Chief Baron Gilbert to illustrate the nature of presumption is, where a man is discovered suddenly dead in a room, and another is found running out in haste with a bloody sword; this is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such facts; and the next proof to the sight of the fact itself is, the proof of those circumstances that usually attend such fact. *Id.*

"The principal difference," observes an eminent writer on the law of evidence," (1 *Phill. Ev.* 156, 7*th ed.*) "to be remarked between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, is, that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter case, which affects life and liberty." The same doctrine is asserted by Mr. M'Nally, in his *Rules of Evidence on Pleas of the Crown*, p. 578. "Everything," he observes, "is a doubt in a civil case, where the jury weigh the evidence, and having struck a fair balance, decide according to the weight of the evidence. This, however, is not the rule in criminal cases, for it is an established maxim, that the jury are not to *weigh* the evidence, but in cases of doubt to acquit the prisoner." The soundness of this distinction may, perhaps, be doubted. The rules adopted with regard to the admission of presumptions in civil cases, are grounded on the principle that they tend to the discovery of the truth, and the consequences which are to ensue upon that discovery seem to have no bearing upon the application of the rule. Great caution is doubtless necessary in all cases of presumptive evidence; and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods *of a certain person*

unknown, merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead." 2 *Hale*, 290. So it is said by Sir William Blackstone, 4 *Comm.* 359, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. The following case on this subject was cited by Garrow, *arguendo*, in *Hindmarsh's case*, 2 *Leach*, 571. The mother and reputed father of a bastard child, were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child, observed that it was possible the tide might have carried out the *living* infant, and the prisoners were acquitted.

"With respect to the comparative weight due to direct and presumptive evidence, it has been said that circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. *Per Mountenoy, B., Annesley* v. *Lord Anglesea*, 9 *St. Tr.* 426, 17 *Howell*, 1430. It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognizance of a jury, and to require a greater number of witnesses than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. *See Bentham's Rationale of Judicial Evidence*, vol. 3, p. 251. On the other hand it may be observed, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences; there is also a kind of pride or vanity felt in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect him. And it may be observed, that circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence, and that, moreover, it is subjected to this additional infirmity that it is composed of inferences each of which may be fallacious." *Phill. Ev.* 458, 8th ed.

General instances of presumption.] As almost every fact is capable of being proved by presumptive as well as by positive evidence, it would be impossible to enumerate the various cases in which the former evidence has been admitted. It may be useful, however, to state some particular instances of presumptive proof which may occur in the course of criminal proceedings.

Proof of the possession of land, or the receipt of rent, is *primâ facie* evidence of seisin in fee. *Co. Litt.* 15, *a. B. N. P.* 103. So possession is presumptive evidence of property in chattels. A deed or

other writing thirty years old is presumed to have been duly executed, provided some account be given of the place where found, &c. *B. N. P.* 255. The licence of a lord to enclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognizant of it. *Doe* v. *Wilson*, 11 *East*, 56. *Bridges* v. *Blanchard*, 1 *A. & E.* 536. The flowing of the tide is presumptive evidence of a public navigable river, the weight of such evidence depending upon the nature and situation of the channel. *Miles* v. *Rose*, 5 *Taunt.* 705; 1 *Marsh*, 313, *S. C.* *R.* v. *Montague*, 4 *B. & C.* 602. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. *Joliffe's case*, 2 *B. & C.* 54; 3 *D. & R.* 240, *S. C.* So the continuance of things *in statu quo* will be generally presumed; as where the plaintiff being slandered in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved though averred. *Budd's case*, 5 *Esp.* 230. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *Dixon's case*, 3 *M. & S.* 11, 15.

So a letter is presumed, as against the writer, to have been written upon the day on which it bears date; *Hunt* v. *Massey*, 5 *B. & Ad.* 902; 3 *Nev. & M.* 109; and whether written by a party to the suit or not; *Poten* v. *Glossop*, 2 *Ex. R.* 191; and a bill is presumed to be made on the day it is dated; *Owen* v. *Waters*, 2 *M. & W.* 91; except when used to prove a petitioning creditor's debt; *Anderson* v. *Weston*, 6 *New Cases*, 296, 301. So the presumption is that indorsements on a note admitting the receipt of interest were written at the time of their date; *Smith* v. *Battens*, 1 *Moo. & R.* 341. Indeed it is a general presumption that all documents were made on the day they bear date; *Davies* v. *Loundes*, 7 *Scott, N. R.* 214; *Poten* v. *Glossop*, 2 *Ex. R.* 191.

Presumption of innocence and legality.] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption. Where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. *R.* v. *Inhab. of Twyning*, 2 *B. & A.* 386. But the observations of Bayley, J., and Best, J., in *Rex* v. *Twyning*, with respect to conflicting presumptions, were questioned by the court in *Rex* v. *Harborne*, 2 *Ad. & E.* 544; where it was decided, that the court of Quarter Sessions were right in presuming that the first wife was living, although such presumption led to the conclusion that the husband had been guilty of bigamy. It is to be observed, that the circumstances of the two cases differed so much as to justify the court of Quarter Sessions even on the doctrine of contrary presumptions, in coming to opposite conclusions upon them. It is a rule, that illegality is never to be presumed, but the presumption is that a party complies with the law. *Sissons* v. *Dixon*, 5 *B. & C.* 758. Thus legitimacy is always presumed. *Banbury Peerage case*, 2 *Selw. N. P.* 709. So where a letter is sent with a parcel of goods, it will be presumed to relate to the goods, so as to come within the proviso of 43 Geo. 3, c. 81. *Bennet* v. *Clough*, 1 *B. & A.* 461. See upon the point of conflicting presumptions, *Middleton* v. *Barned*, 4 *Ex. R.* 241.

Upon the same principle it will be presumed, where persons act in

a public capacity, that they have been regularly appointed. Thus the fact of a person acting in the character of a surrogate is *primâ facie* evidence that he was duly appointed, and had competent authority. *Verelst's case*, 3 *Campb.* 432, *ante*, p. 7. So where a person acts as a special commissioner, for taking affidavits. *Howard's case*, 1 *Moo. & Rob.* 187, *ante*, p. 7. So where a person acts as a peace officer, justice of the peace, &c., it is a general presumption of law that he is duly authorized to do so. *Per Buller, J. Berryman* v. *Wise*, 4 *T. R.* 366, *ante*, p. 6. And on an indictment for the murder of a constable in the execution of his duty, it has been held not to be necessary to produce his appointment, it being sufficient if he was known to act as constable. *Gordon's case*, 1 *Leach*, 515; 1 *East*, *P. C.* 352; *S. C. ante*, p. 6. So evidence that a letter-carrier acted as such is sufficient without proving his appointment. *Per Parke, B.*, *Rees's case*, 6 *C. & P.* 606. So of an attested soldier engaged in the recruiting service. *Walton* v. *Gavin*, 16 *Q. B.* 48. So it is sufficient to show that a person acted in a public service without producing his appointment. *Per Littledale, J.*, *Bolland, B.*, *and Bosanquet, J.*, *Borrett's case*, 6 *C. & P.* 124. So where constables and watchmen have been appointed by commissioners under a local act. *Butler* v. *Ford*, 3 *Tyrwh.* 677; 1 *Cr. & M.* 662. So where a person acts as vestry clerk; *M'Gahey* v. *Alston*, 2 *M. & W.* 206; or as overseer; *Cannell* v. *Curtis*, 2 *New Cases*, 228. Where certain trustees were empowered by two private acts of parliament to raise money to build a new church, and they had made a church rate under such acts, Coleridge, J., held that proof that they all acted as trustees on one occasion previous to signing the rate, was evidence to go to the jury that they were trustees. *Murphy's case*, 8 *C. & P.* 310.

In all these cases, however, the evidence is not conclusive and may be rebutted. 3 *Tyrwh.* 684; 1 *Cr. & M.* 669.

Of guilt—arising from the conduct of the party charged, at the time of or after the charge.] In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party at the time of, or after being charged with, the offence. Thus it is frequently proved that upon being charged he fled, or endeavoured to make his escape. Upon this proof it is said by Smith, B., that he had the authority of the law to say, that though a man charged with an offence should fly, that is not conclusive evidence of guilt. The jury could not forget that one of the oaths they had taken was, whether the prisoner had fled in consequence of the charge made on him; but though it should be established that he fled in consequence of the charge, yet it did not follow of necessity that he was guilty of the murder; though it was a circumstance materially unfavourable and suspicious. *Crawley's case*, 40 Geo. 3. *M'Nally on Ev.* 577. The introduction of a falsehood into the defence is also a presumption against a prisoner. This presumption is heightened if the falsehood is to be supported, as it almost necessarily must be, by a witness conscious of it. *Clarke's case*, *Bury Spring Assizes*, 1789, *Gilb. Ev. by Loft*, 898. *M'Nally on Ev.* 580. No presumption of guilt arises from the silence of a prisoner when, on his examination before a magistrate, he is charged by another prisoner with having been joined in the commission of the offence. *Appleby's case*, 3 *Stark. N. P.* 33. *Vide post*, p. 55.

In weighing the effect of the presumptive evidence furnished by

the conduct of a person charged with the criminal offence, great caution should be exercised. An innocent man finding himself in a situation of difficulty, and perhaps from the circumstances of the case, of danger, is sometimes induced to adopt a line of conduct which bears with it a presumption of guilt. A strong instance of this is to be found in *Hale*, 2 *P. C.* 290 (*n*). The case was thus: An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offence, she was heard to say, *Good uncle, do not kill me!* after which she could not be found. The uncle was committed on suspicion of having murdered her, and was admonished by the judge of the assize to find out the child by the next assizes. Being unable to discover his niece, he brought another child, dressed like his niece, and resembling her in person and years; but, on examination, the fraud was detected, and upon the presumption of guilt which these circumstances afforded, he was found guilty and executed. The child afterwards re-appeared, when of age, to claim her land. On being beaten by her uncle, she had run away, and had been received by a stranger.

Various other instances of the presumption of guilt arising from the conduct of the party before the charge, will be found in the following pages.

Presumption of guilt arising from the possession of stolen property, &c.] The most common case of presumptive evidence in criminal proceedings, is the presumption arising from the possession of stolen property. The rules on this subject are well stated by Mr. East. "It may be laid down generally," he says, "that whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as the length of time which has elapsed between the loss of the property, and the finding it again; either as it may furnish more or less doubt of the identity of it, or as it may have changed hands oftener in the meantime, or it may have increased the difficulty to the prisoner of accounting how he came by it: in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot, from whence the property is supposed to have been taken, at the time, as well as his conduct during the whole transaction, both before and after the recovery, are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another had lost, unless that other can, from marks of circumstances, satisfy the court and jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though where the fact is very recent, so as to afford a reasonable presumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus, a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharfs, have often been convicted of larceny

at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them." 2 *East, P. C.* 656. "If," said Maule, J., in *R.* v. *Barton, Dears. C. C. R.* 284, "a man go into the London Docks sober, and comes out of one of the cellars wherein are a million gallons of wine very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed." The fact of concealment (the identity of the property not being proved) is not of itself evidence of stealing, though undoubtedly very strong corroborative proof of it. *Id.* 657. 3 *Inst.* 98.

Where stolen property was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley, J., held that the prisoner could not be called on to account for the manner in which it came into his possession. *Anon.* 2 *C. & P.* 459. Where seventy sheep were stolen on Thorley Common, on the 18th of June, but were not missed until November, and the prisoner was in possession of four of the sheep in October, and of nineteen others on the 23rd of November, Bayley, J., allowed evidence of the possession of both to be given. *Dewhurst's case*, 2 *Stark. Ev.* 449 (*n*), 2*d ed.* Where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner, two months after they had been stolen, Patterson, J., held that the prisoner should explain how he came by the property. *R.* v. *Partridge*, 7 *C. & P.* 551. But Parke, B., directed an acquittal where the only evidence against the prisoner was that certain tools had been traced to his possession, three months after their loss. *R.* v. *Adams*, 3 *C. & P.* 600; and Maule, J., did the same, where a horse, alleged to have been stolen, was not traced to the possession of the prisoner until six months from the date of the robbery. *R.* v. *Cooper*, 3 *C. & Kir.* 318.

Cases frequently arise of the discovery of property recently after its being stolen, in the house of a particular person, but the weight of this evidence must depend upon the accompanying circumstances of the case. "It is to be carefully observed," says Mr. Starkie, "that the mere finding of stolen goods in the house of the prisoner, where there are other inmates capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner." 2 *Stark. Ev.* 450 (*n*), 2*nd ed.*

In order to render evidence of the possession of stolen property admissible, it is not necessary that the discovery should take place before the apprehension of the prisoner. In *Watson's case*, 2 *Stark. N. P.* 139, Lord Ellenborough cited a case from recollection, where a butler to a banker had been taken up on suspicion of having committed a great robbery. The prisoner had been seen near the privy, and the circumstance having excited suspicion in the minds of the counsel, who considered the case during the York assizes, at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted. He had been separated from the custody of the plate since he had been confined in York Castle for some time, but no doubt was entertained as to the admissibility of the evidence; and Abbott, J.,

observed that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension.

The possession of stolen property is sometimes used, not as presumptive evidence of the fact of larceny, but as proof of the commission of another offence. Thus, on a charge of arson, the evidence of the prisoners' having been present and implicated in the fact was, that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them; Buller, J., doubted at first whether such evidence of another felony could be admitted in support of the charge, but as it seemed to be all one act, he admitted it. *Rickman's case*, 2 *East*, *P. C.* 1035.

In the application of the evidence respecting the possession of stolen property, great caution is necessary. "If a horse be stolen from A.," says Lord Hale, "and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance, B. was condemned and executed at Oxford assizes; and yet, within two assizes after, C., being apprehended for another robbery, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion, and escaped, and B. was apprehended with the horse, and died innocently." 2 *Hale*, *P. C.* 289. The following remarks by Mr. East on this subject are well deserving of attention. "It has been stated before, that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given, little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption; and therefore, where this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession." 2 *East*, *P. C.* 665.

Presumption of malice, &c.] When a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued. See *Dixon's case*, 3 *M. & S.* 15. Thus a presumption of malice arises in many cases. "In every charge of murder," says Mr. Justice Foster, "the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumes the fact to be founded in malice, until the contrary appears." *Foster*, 255; 1 *Hale*, *P. C.* 455; 1 *East*, *P. C.* 340. Where a man was convicted of setting fire to a mill, with intent to injure the occupiers thereof, a doubt occurred whether, under the words of the 43 Geo. 3, c. 58, an intent to injure or defraud some person was not necessary to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that a person who does

an act wilfully, necessarily intends that which must be the consequence of the act, *viz.*, injury to the owner of the mill burned. *Farrington's case, Russ. & Ry.* 207. See also *Philp's case*, 1 *Moody, C. C.* 263.

Presumption of intent to defraud.] An intent to defraud may be presumed where the effect of the act committed by the party is to defraud another party. Thus where a person was indicted for disposing of a forged bank-note, with intent to defraud the Bank of England, and the jury found that the intention of the prisoner was to defraud whoever might take the note, and that the intention of defrauding the bank in particular did not enter into his contemplation; a question was submitted to the judges, whether an intention to defraud the bank ought to be inferred, where that intention was not likely to exist in the prisoner's mind, and where the caution ordinarily used would naturally protect the bank from being defrauded? Their lordships were of opinion, that the prisoner, upon the evidence in this case, must be taken to have intended to defraud the bank, and consequently that the conviction was right. *Mazagora's case, Russ. & Ry.* 291. And even where the prosecutor, on an indictment for forging a receipt with intent to defraud him, swore that he believed the prisoner had no such intent, the judge told the jury that the defrauding being the necessary effect and consequence of the forgery, it was sufficient evidence of the intent of the prisoner for them to convict him; and he was convicted accordingly. The twelve judges held the conviction to be right. *Sheppard's case, Russ. & Ry.* 169. So where, on an indictment for uttering a forged bill of exchange, Alderson, B., told the jury that if they were satisfied that the prisoner uttered the bill as a true bill, meaning it to be taken as such, and when he did so knew it to be forged, they ought to find, as a necessary consequence of law, that he meant to defraud. The judges held that the direction was right. *Hill's case*, 8 *C. & P.* 274. See also *Philp's case*, 1 *Moody, C. C.* 263. *Beard's case*, 8 *C. & P.* 143.

Presumption of the duration of life.] In analogy to the statute respecting bigamy (*vide post, tit.* Bigamy), at the expiration of seven years from the period when a person was last heard of, he will be presumed to be dead; *Doe* v. *Jesson*, 6 *East*, 84; *Doe* v. *Deakin*, 4 *B. & A.* 433; and with the addition of other circumstances, the presumption may arise at an earlier period. Thus evidence that a person sailed in a ship bound for the West Indies, two or three years ago, and that the ship has not been since heard of, is presumptive evidence of the death of the party; but the time of his death, if material, must depend upon the particular circumstances of the case. *Watson* v. *King*, 1 *Stark. N. P.* 121. The fact of the party being dead or alive at any particular period within or at the end of the seven years, must be proved by the party asserting that fact. *Doe* v. *Nepean*, 5 *B. & Ad.* 86. And see *Rex* v. *Harborne*, 2 *A. & E.* 540. *Nepean* v. *Doe d. Knight*, 2 *M. & W.* 894. *Sillick* v. *Booth*, 1 *Y. & Coll.* 117.

HEARSAY.

THE term hearsay evidence is used with reference both to that which is written and to that which is spoken. But in its legal sense, it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information. *Phill. Ev.* 197, 8*th ed.*

General nature of hearsay evidence.] Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the party originally stating the facts does not make the statement under the sanction of an oath: and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. Where, however, the peculiar circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible, as in the following instances.

Hearsay admissible as part of the res gestæ.] Where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said, by *both* parties, during the continuance of the transaction is admissible; for to exclude this would be to exclude the most important and unexceptional evidence. In this case, it is not the relation of third persons unconnected with the fact, which is received, but the declarations of the parties to the fact themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner, may

be received in evidence as part of the transaction. *Lord G. Gordon's case*, 21 *How. St. Tr.* 535. So in a prosecution for a rape, the fact of a woman having made a complaint soon after the assault took place, is evidence; but it was ruled by Holroyd, J., that the *particulars* of her complaint could not be given in evidence. *Clarke's case*, 2 *Stark. N. P. C.* 242. By the laws of Scotland, the particulars of such declarations, when made *de recenti*, are allowed to be given in evidence. Thus in a case of rape, followed by cutting and stabbing, the account which the woman gave when she returned home, all bleeding, the following morning, of the way in which she had been used by the prisoner, was allowed to be fully laid before the jury, though she had just before been examined herself. *M'Cartney's case*, 1828, *Alison, Prac. Crim. Law of Scotl.* 514. And in another case of rape, the account which the woman gave to several witnesses the next day, was laid without reserve before the jury. *M'Kenzie's case, Id.* But this privilege is extended to those accounts only which are connected more or less directly with the *res gestæ* of the inquiry, or which were so recently given after it, as to form in some sort a sequel to the actual violence. *Id.* 515. On an indictment for an assault on a child with intent to ravish, the fact of her having complained of the injury recently after it was received, is confirmatory evidence. *Brazier's case*, 1 *East, P. C.* 444. In this case the evidence of the child having made a complaint was received, although the child herself was not examined, she being only five years old, and incapable of taking an oath. Such evidence being only admissible as confirmatory evidence, would hardly be received now. In a recent case, it was said by Parke, B., "at the time of *Brazier's* case, it seems to have been considered, that as the child was incompetent to take an oath, what she said was receivable in evidence. The law was not so well settled then as it is now." *Guttridge's case*, 9 *C. & P.* 472; *S. P. Per Parke, B., Walker's case*, 2 *Moo. & R.* 212. The counsel for the prisoner may, however, if he thinks proper, elicit the particulars of the complaint on cross-examination. *Ibid.* "The sense of the thing," said Parke, B., in that case, "certainly is that the jury should, in the first instance, know the nature of the complaint, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire, generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination." In *R.* v. *Osborne, C. & Marsh.* 624, Cresswell, J., ruled that the prosecutrix might be asked whether at the time she made the complaint she named a person as having committed the offence, but not whose name she mentioned. Where the prosecutrix had died before the trial, and without her deposition having been taken, Rolfe, B., received evidence (the prisoner's counsel not objecting) that she had made a complaint, on her return home, of an outrage having been committed upon her, but held that the particulars of such complaint were not admissible. *Meyson's case*, 9 *C. & P.* 420. But in a case where the prosecutrix was called but did not appear, and it was objected on the part of the prisoners that evidence of recent complaint is receivable only to confirm the prosecutrix's story, and that as her evidence was not before the jury it could not be confirmed, Parke, B., rejected evidence of the prosecutrix having made a complaint. *Guttridge's case*, 9 *C. & P.* 471. Again, in actions of assault, what a man has said of himself to his surgeon, is admissible to show what he has suffered by the

assault. *Per Lawrence, J., Aveson* v. *Kinnaird*, 6 *East*, 199. So where a man was killed in consequence of having been run over by a cabriolet, it was held, on an indictment against the driver for manslaughter, that what the man said immediately after receiving the injury, was admissible in evidence. *Foster's case*, 6 *C. & P.* 325. So inquiries by medical men, with the answers to them, are evidence of the state of health of the patients at the time, and the symptoms and conduct of the parties themselves at the time, are always received in evidence upon such injuries, and must be resorted to from the very nature of the thing. *Per Lord Ellenborough, Aveson* v. *Kinnaird*, 6 *East*, 195. On an indictment under 7 & 8 Geo. 4, c. 30, s. 4, for breaking a machine, Patteson, J., allowed a witness to be asked, whether the mob by whom the machine was broken, did not compel persons to go with them and give one blow to each machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree to run away from the mob at the first opportunity. *Crutchley's case*, 5 *C. & P.* 133. Where a constable entered a house, with a warrant in his hand, and searched it; upon an indictment against him and others for a forcible entry, evidence was permitted to be given of what the constable said at the time as to the person for whom he was searching. *Eliza Smyth's case*, 5 *C. & P.* 201, per *Lord Tenterden, C. J.* Upon an indictment for robbery, the prosecutor moved that he went early the next morning and complained to a constable, and mentioned the name of one of the persons who robbed him. Patteson, J., held that the constable could not be asked what name the prosecutor mentioned, but might be asked whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and if he did, who that person was. *Wink's case*, 6 *C. & P.* 397. See *R.* v. *Osborne*, *C. & Marsh.* 624.

An indictment for perjury charged, that, in a suit in Chancery it became material to ascertain, whether an annuity granted by G. H. to the defendant, or by G. H. to B., as trustee for the defendant, had been paid, and that the defendant falsely swore that it had not been paid, whereas in truth the annuity had been paid by G. H. to B., and B. had paid it to the defendant. In order to show that B., who had been abroad since 1832, had paid the money to the defendant, it was proved that B. had sent money to his bankers by his clerk, and it was proposed to ask the clerk what B. said about the money at the time the clerk received it from him to pay in at the bankers. On the question being objected to, Littledale, J., held it might be put, and that the evidence was receivable, on the ground of its being a declaration made at the time by an agent within the scope of his authority. The learned judge took a note of the objection, but the defendant was acquitted on the merits. *Hall's case*, 8 *C. & P.* 358.

Where a will is disputed on the ground of fraud, circumvention or forgery, the testator's declarations of his intentions are admissible. *Doe* v. *Hardy*, 1 *Moo. & R.* 525.

The admissibility of a declaration depends, on its connection with, and on the light which it throws on, an act which is in itself relevant and admissible evidence. See the opinions of the judges in *Wright* v. *Doe d. Tatham*, 7 *Ad. & E.* 313; 4 *New Cases*, 489. But the declaration need not be contemporaneous with the act, although, of course, the concurrence of time is always material to show the connection. *Rouch* v. *The Great Western Railway Company*, 1 *Q. B.* 51.

The following instance of hearsay, admissible as part of the *res*

gestæ, are mentioned by Mr. Phillipps. If it be material to inquire whether a certain person gave a particular order on a certain subject, what he has said or written, may be evidence of the order (*see Jenkins's case*, 1 *Lewin*, *C. C.* 114); or where it is material to inquire whether a certain fact, be it true or false, has come to the knowledge of a third person, what he has said or written may as clearly show his knowledge, as what he has done. Where it is relevant and material to inquire into the conduct of rioters, what has been said by any of the party in the act of rioting, must manifestly be admissible in evidence, as showing their design and intention. On a charge of larceny, where the proof against the prisoner is that the stolen property was found in his possession, it would be competent to show on behalf of the prisoner, that a third person left the property in his care, saying that he would call for it again afterwards; for it is material in such a case, to inquire under what circumstances the prisoner first had possession of the property. 1 *Phill. Ev.* 233, 7*th ed.*

With respect to the declarations of parties combined together for some illegal purpose, *see post, and title, Conspiracy.*

Hearsay admissible—on questions of pedigree.] The written or verbal declarations of deceased members of a family, are admissible on questions of pedigree. Declarations in a family, descriptions in a will, inscriptions upon monuments, in Bibles and registry books, are all admitted upon the principle that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed, or fall short of, the truth. *Per Lord Eldon*, *Whitelocke* v. *Baker*, 13 *Ves.* 514. But a pedigree collected from "registers, wills, monumental inscriptions, family records and history," is not evidence, although signed by members of the family, *Davies* v. *Lowndes*, 5 Bing. *N. C.* 161; except to show the relationship of persons described in it as *living*, *S. C.* 6 *M. & Gr.* 474; 7 *Scott's N. R.* 141.

The declarations must be by persons connected by family or marriage with the person to whom they relate; and therefore what has been said by servants and intimate acquaintances; *Johnson* v. *Lawson*, 2 *Bing.* 86; 9 *B. Moore*, 183, *S. C.*; or by illegitimate relations; *Doe* v. *Barton*, 2 *Moo. & R.* 28; is not admissible. See *Doe* v. *Davies*, 10 *Q. B.* 314. The declarations need not be contemporaneous with the matters declared. Thus a person's declaration that his grandmother's maiden name was A. B. is admissible. *Per Brougham, C.*, *Monkton* v. *Att.-Gen.*, 2 *Russ. & M.* 158.

If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage case*, 4 *Camp.* 415. The term controversy must not be understood as meaning merely an existing suit. 2 *Russ. & M.* 161. *Walker* v. *Beauchamp*, 6 *C. & P.* 552. See further, *Crouch* v. *Hooper*, 16 *Beav.* 182.

Hearsay admissible—on questions of public or general right.] On questions of public or general right; as a manorial custom; *Denn* v. *Spray*, 1 *T. R.* 466; the boundaries between parishes and manors; *Nicholls* v. *Parker*, 14 *East*, 331; or a ferry; *Pim* v. *Curell*, 6 *M. & W.* 234; a feeding *per cause de vicinage* existing by in memorial custom; *Prichard* v. *Powell*, 10 *Q. B.* 589; explained in *Earl of Dunraven* v. *Llewelyn*, 15 *Q. B.* 811, 812; hearsay or public reputation is admissible. But reputation is not evidence of a particular fact.

Weeks v. *Sparke*, 1 *M.* & *S.* 687. So though general reputation is evidence, tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland* v. *Powell*, *Peake Ev.* 15. *Cooke* v. *Banks*, 2 *C.* & *P.* 481. Declarations of old persons, concerning the boundaries of parishes, have been received in evidence, though they were parishioners and claimed rights of common on the waste, which the declarations had a tendency to enlarge. *Nicholls* v. *Parker*, 14 *East*, 331. *Plaxton* v. *Dare*, 10 *B.* & *C.* 19. But the declarations of a deceased lord of the manor, as to the extent of the waste, are not evidence. *Crease* v. *Barrett*, 5 *Tyrwh.* 458; 1 *Cr.*, *M.* & *R.* 919. Where the question is, whether certain lands are in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence of reputation that the lands are in that parish. *Plaxton* v. *Dare*, 10 *B.* & *C.* 17; and see *Brett* v. *Beales*, *M.* & *M.* 416. The declaration of an old person, who is still living, is not admissible as proof of reputation. *Per Patteson, J.*, *Woolway* v. *Rowe*, 1 *A.* & *E.* 117; *Phill. Ev.* 284, 8*th ed.* In order to admit of evidence of reputation, it is not necessary that user should be shown. *Crease* v. *Barrett*, *supra*. Declarations of this kind are not evidence *post litem motam*. *Cotton's case*, 3 *Camp.* 444.

Hearsay admissible—of persons having no interest to misrepresent.] It is on this ground that entries by a deceased vicar or rector, of the receipt of ecclesiastical dues, have been admitted for his successor. *Armstrong* v. *Hewitt*, 4 *Price*, 218. And even where the entries were by deceased impropriate rectors, they have been received in evidence for their successors, though objected to as being made by the owner of the inheritance. *Anon. Bunb.* 46. *Illingworth* v. *Leigh*, 4 *Gwill.* 1618. The reception of this kind of evidence has given rise to much observation, and has been thought an anomaly in the law of evidence. See *Phill. Ev.* 322, 8*th ed.*, and the cases there cited.

Hearsay admissible—of persons speaking against their own interest.] The declarations of deceased persons made against their own interest, are admissible; as where a man charges himself with the receipt of money, it is evidence to prove the payment. *Goss* v. *Watlington*, 3 *B.* & *B.* 132. *Whitnash* v. *George*, 8 *B.* & *C.* 556. So a statement by a deceased occupier of land, that he rented it under a certain person, is evidence of such person's seisin. *Uncle* v. *Watson*, 4 *Taunt.* 16. So a deed by a deceased party shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe* v. *Coulthred*, 7 *A.* & *E.* 235. So a written attornment to L., by a tenant in possession, is evidence of L.'s seisin. *Doe* v. *Edward*, 5 *A.* & *E.* 95. The principle is, that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's interest. *Crease* v. *Barrett*, 5 *Tyrwh.* 473; 1 *Crom.*, *M.* & *R.* 931. In all these cases it must appear that the effect of the declaration is to charge the party making it. *Calvert* v. *Archbishop of Cant.*, 2 *Esp.* 646. If the party who made the entry be alive, although out of the jurisdiction of the court so that he cannot be called, the proof of the entry is inadmissible. *Stephen* v. *Gwennap*, 1 *Moo.* & *R.* 121; *Smith* v. *Whittingham*, 6 *C.* & *P.* 78. And *semble*, that if the declaration be oral, it is in like manner admissible in evidence. *Stapylton* v. *Clough*, 2 *E.* & *B.* 933; *Bradley* v. *James*, 13 *C. B.* 822. The declarations of persons who, at the time of making them,

stood in the same situation and interest as the party to the suit, are evidence against that party: thus the declaration of a former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, is admissible; *Woolway* v. *Rowe*, 1 *A.* & *E.* 114; and even although he is alive, and not produced, *S. C.* The declarations of tenants are not evidence against reversioners, although their acts are. *Per Patteson, J.*, *Tickle* v. *Brown*, 4 *A.* & *E.* 378.

Hearsay admissible—of persons making entries, &c. in the regular course of their duty or employment.] Where a person in the course of his employment makes a declaration, such declaration, after the death of the party, has in certain cases been admitted as evidence; as where an attorney's clerk indorsed a memorandum of delivery on his master's bill, this was held to be evidence of the delivery. *Champneys* v. *Peck*, 1 *Stark. N. P.* 404. See also *Furness* v. *Cope*, 5 *Bing.* 114. *Chambers* v. *Bernasconi*, 4 *Tyrwh.* 531; 1 *Cr., M.* & *R.* 347. So a notice indorsed as served by a deceased attorney's clerk, whose duty it was to serve notices, is evidence of service. *Doe* v. *Turford*, 3 *B.* & *Ad.* 890. So an entry of dishonour of a bill, made by the clerk of a notary in the usual course of business, is evidence, after the clerk's decease, of the fact of dishonour. *Poole* v. *Dicas*, 1 *New Cases*, 649. So contemporaneous entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price* v. *Lord Torrington*, 1 *Salk.* 285. See also 3 *B.* & *Ad.* 898. But it would appear that the person who made the entry, must have done the business to which it refers. *Brain* v. *Preece*, 11 *M.* & *W.* 773; and see *Doe* v. *Skinner*, 3 *Ex. R.* 84.

In order to make such entries evidence, it must appear that the shopman is dead; it is not sufficient that he is abroad and is not likely to return. *Cooper* v. *Marsden*, 1 *Esp. N. P.* 1.

Dying declarations in general.] Analogous to the cases in which hearsay evidence is admissible, as being part of the *res gestæ*, are the cases of dying declarations. Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other felonies, viz. the party injured himself, is got rid of. 1 *East, P. C.* 353. But it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted, is that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. *Woodcock's case*, 1 *Leach*, 502.

Where the declarations offered in evidence as to the cause of death, are of a deceased who has been *particeps criminis* (as a woman who has been killed by attempting to procure abortion), they are, nevertheless, as it seems, admissible against the other party. In *Tinkler's case*, 1 *East*, 354, where such evidence was received, the judges, on an objection to it, answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a

witness for the crown; and though the practice be not to convict on such proof uncorroborated, yet the evidence is admissible.

On an indictment for the murder of a girl four years of age, Park, J., refused to hear evidence of her declarations, observing, that however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. In this decision Parke, B., concurred. *Pike's case*, 3 *C. & P.* 598. But when the child is of an intelligent mind, impressed with the nature of an oath and expecting to die, the declaration is receivable. See *Perkins's case*, 2 *Moo. C. C.* 135, where the child was eleven years old, stated *post.* So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness; consequently, a declaration upon matters of opinion, as distinguished from facts, will not be receivable. *Sellers' case*, *Carr. Cr. L.* 233. Dying declarations in favour of the party charged with the death, are admissible in evidence, equally as where they operate against him. *Scaife's case*, 1 *Moo. & R.* 551. It is no objection to a dying declaration that it has been elicited by questions put to the deceased. *Fagent's case*, 7 *C. & P.* 238. See also *Reason's case*, 1 *Str.* 499. *Woodcock's case*, 1 *Leach*, 500. In the last case the deceased was examined upon oath by a magistrate, and the examination signed by both. The question, whether a dying declaration is admissible in evidence, is exclusively for the consideration of the court. *Per Lord Ellenborough*, *Huck's case*, 1 *Stark. N. P.* 523. See also *John's case*, 1 *East, P. C.* 358; 1 *Phill. Ev.* 304, *8th ed.*, 291, *9th ed.*

Dying declarations—admissible only in cases of homicide, where the circumstances of the death are the subject of the declaration.] It is a general rule, that dying declarations, though made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death is the subject of the dying declarations. *Per Abbott, C. J.*, *Mead's case*, 2 *B. & C.* 600. Therefore, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion, and evidence of the woman's dying declarations was tendered, Bayley, J., rejected it, observing, that although the declarations might relate to the cause of the death, still such declarations were admissible in those cases only, where the death of the party was the subject of inquiry. *Hutchinson's case*, 2 *B. & C.* 608 (*n*). A man having been convicted of perjury, a rule for a new trial was obtained, pending which, the defendant shot the prosecutor, who died. On showing cause against the rule, an affidavit was tendered of the dying declarations of the prosecutor, as to the transaction out of which the prosecution for perjury arose; but the court were of opinion that this affidavit could not be read. *Mead's case*, 2 *B. & C.* 605; 4 *D. & R.* 120, *S. C.* So evidence of the dying declarations of the party robbed has been frequently rejected on indictments for robbery. *Lloyd's case*, 4 *C. & P.* 233; also by *Mr. Justice Bayley*, on the *Northern Spring Circuit*, 1822, and by *Mr. Justice Best*, on the *Midland Spring Circuit*, 1822; 1 *Phill. Ev.* 285, 8*th ed.*, 282, 9*th ed.*

The following case seems rather an exception to this rule. The prisoner was indicted for poisoning John King. The poison was administered in a cake on which the deceased breakfasted, and was

immediately taken ill, whereupon he told his son not to eat the remainder of the cake. His maid servant who was present, and who had made the cake, said she was not afraid of it, and she proceeded to partake of it, and was in consequence poisoned, and speedily died. Her dying declarations (made after she knew of her master's decease), as to the manner in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other, were tendered in evidence on the part of the prosecution. An objection to their admissibility was taken for the prisoner, and *Hutchinson's case* (*supra*) was cited. Coltman, J., after consulting Parke, B., expressed himself of opinion, *that as it was all one transaction*, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the judges. The prisoner, however, was acquitted. *Baker's case*, 2 *Moo. & R.* 53.

From the judgment of the Court of Exchequer in a recent case, it may be assumed, that dying declarations would not now be admitted in any civil case. *Stobart* v. *Dryden*, 1 *M. & W.* 615. It was there decided, that the declarations of an attesting witness to a deed, who was since dead, tending to prove that he had either forged or fraudulently altered the deed, could not be received in evidence.

Dying declarations admissible—the party must be aware of his situation.] Dying declarations are only admissible where the party making them, knows or thinks that he is in a dying state. Positive evidence of this knowledge is not required; but it may be inferred from the general conduct and deportment of the party. Nor is it necessary to prove expressions of apprehension of *immediate* danger, if it be clear that the party does not expect to survive the injury. *Per Patteson, J.*, *Bonner's case*, 6 *C. & P.* 386. Neither does it seem necessary that the deceased should have used any expressions whatever, declaring his belief that he could not recover, if his condition was such that he must have felt that he was a dying man. Thus where a woman who had been dreadfully wounded, and who afterwards died of the wounds, made a declaration, the question was, whether it was made under the impression that she was dying. The surgeon said that she did not appear to be at all sensible of the danger of her situation, dreadful as it seemed to all around her, but lay quietly submitting to her fate, without explaining whether she thought herself likely to live or die. Eyre, C. B., was of opinion, that inasmuch as she was mortally wounded, and was in a condition which rendered immediate death almost inevitable, as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation, her declarations made under these circumstances were to be considered by the jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death, and must have considered herself as a dying woman. *Woodcock's case*, 1 *Leach*, 503. Again, in another case it was held by all the judges, that if a dying person either declares that he knows his danger, or it is reasonably to be inferred from his wound or state of illness, that he is sensible of his danger, his declarations are good evidence. *John's case*, 1 *East*, *P. C.* 357; 1 *Leach*, 504 (*n.*) *S. C.* The prisoner was tried for the rape and murder of a young girl of sixteen. The deceased lived only a few days after the perpetration

of the offence, the particulars of which she communicated to her aunt, but did not intimate that she considered herself in a dying condition, or that she had any apprehension of immediate death. It appeared, however, that previous to making this declaration, she had confesssed, had been absolved, and had received extreme unction from a priest, and that these are considered the last rites administered in the Catholic Church, and are esteemed sacraments by its disciples. Lord Kilwarden, C. J., with the concurrence of Kelly, J., admitted the declaration in evidence. *Minton's case*, 40 *Geo.* 3, 1 *M'Nally*, 386. See also *Mosley's case*, *post*, p. 33, and *Hayward's case*, 6 *C. & P.* 160. A boy between ten and eleven years of age was severely wounded by a gun loaded with shot, and died the next morning. On the evening of the day upon which he was wounded, he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, "My good boy, you must know you are now labouring under a severe injury, from which, in all probability, you will not recover, and the effects of it will most likely kill you." The other surgeon told him, "You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The boy made no reply, but his countenance changed and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a statement to the surgeons. It was held by the fifteen judges, that this statement was properly received in evidence, on the trial of a party for his murder. *Perkins's case*, 9 *C. & P.* 395; 2 *Moo. C. C.* 135. Considering the age of the boy, and that the surgeons did not tell him positively that there was no hope of recovery, and that he himself expressed no opinion as to his state, the above is rather a strong decision. Probably the judges thought, that it might reasonably be inferred from the nature of his wounds, that the boy, notwithstanding his tender age, must have been aware that he could not recover; see *Woodcock's case*, and *John's case*, *ante*, p. 29; and it seems, according to the report in 2 *Moo. C. C.* p. 140, that all the judges, except Bosanquet, Patteson, and Coleridge, JJ., thought the statements made under the apprehension and expectation of immediate death.

In the following cases, the dying declarations were rejected.

A man named Welbourne was indicted for poisoning his fellow-servant, Elizabeth Page. She declared to the surgeon who attended her, that she was with child by Welbourne, and by his persuasion had been taking bitter apple and a white powder, which was found to be arsenic, for the purpose of procuring abortion. She had recently been in great pain, and was extremely ill, apparently dying, and seemed to be sensible of her situation and danger, though she did not say so, but at the time she made the declaration she was free from pain, mortification having, in the opinion of the apothecary, taken place, and from being so free from pain he believed that she thought she was getting well. The declaration was received, and the prisoner was found guilty; but the case was referred to the judges, on the question, that although in the first part of the apothecary's evidence, he swore that he made the deceased sensible of her danger before she made the declaration, yet, as he afterwards said that, at the time she made the declaration, she believed she was getting better, from the pain ceasing, the evidence ought to have been rejected; and a majority of the judges were of opinion, that it did not sufficiently appear that the deceased knew or thought, when

she made the declaration, she was in a dying condition; on the contrary, she had reason to think, that if she told what was the matter with her, she might have relief and recover. *Welbourne's case*, 1 *Leach*, 503 (*n.*); 1 *East*, *P. C.* 358, *S. C.*

The deceased asked his surgeon if the wound was necessarily mortal; and on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, he replied, "I am satisfied," and after this made a statement; it was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration *in articulo mortis*, since it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might still have had a hope of recovery. *Christie's case*, *O. B.* 1821; *Carr. Supp. C. L.* 202. The surgeon told the deceased that there was no chance of her recovery; yet as she said that she hoped he would do what he could for her, for the sake of her family, Bosanquet, J., refused to admit her declarations, on the ground that her expressions to the surgeon showed a degree of hope in her mind. *Crockett's case*, 4 *C. & P.* 544. It appeared, that on the Saturday of the week preceding the death of the deceased, she expressed an opinion that she would not recover, and made a declaration, but afterwards on the same day she asked her nephew, if he thought she would "rise again." It was held, that the declaration was inadmissible, as the subsequent question showed that she did not believe her recovery hopeless. *Fagent's case*, 7 *C. & P.* 238. Where the expression used by the deceased was, "I think myself in great danger," and *Simpson's case*, *post*, p. 33, was cited in favour of the admissibility of the declaration, Patteson, J., rejected it, observing, "I have always considered, that in order to a statement being received as a dying declaration, it must be shown that, at the time the deceased made it, not merely that he considered himself in danger, but that he was without hopes of recovery." *Errington's case*, 2 *Lewin*, *C. C.* 148. See also *Spilsbury's case*, 7 *C. & P.* 187, where Coleridge, J., held, that, for the purpose of determining whether the declarations ought to be received, the conduct of the deceased should be considered, to see if it was that of a person convinced that "death was at hand," and not merely the expressions he used respecting his condition. In *Megson's case*, 9 *C. & P.* 418, two days before the death of the deceased, the surgeon told her she was in a very precarious state. On the following day being much worse, she said to him that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken place. She then proceeded to make a statement. Rolfe, B., held that this statement was not admissible, as it did not sufficiently appear that, at the time of making it, the deceased was without hope of recovery.

The deceased, who was a police constable, received a gun-shot wound in the thigh, between twelve and one on the morning of Monday. He crawled to a neighbouring house, exclaimed he was dying, and wished a doctor to be sent for. He appeared in very great pain, and complained much. A medical man saw him between one and two, who described him to be in a weak faint state, from which he never rallied. He was removed to his lodgings, and his wound was dressed between four and five, about which time he said, "Oh dear! Doctor, I will never get over this." This witness saw him last between four and five on Monday afternoon, and said that he was no better, and did not seem less desponding. Another surgeon

saw him first, between two and three on Monday morning, to whom he said, "I never will get over this." This witness endeavoured to cheer him up, and said, "I hope we will see you out again." The deceased said nothing, but shook his head, and did not appear cheered up by the hope expressed. The witness saw the deceased again between four and five on Monday afternoon, and again told him that he hoped he would get better, but the remark did not appear to raise him in cheerfulness. About eleven on Tuesday forenoon, the witness observed that fatal symptoms had come on, and had no hopes whatever of recovery. To two other witnesses, who saw him at one and two on the Tuesday afternoon, he said, "I shall never be well more;" and "Yes, this will finish me." Another witness, who saw him in the early part of the afternoon, said to him, "You are very severely wounded, and I believe mortally so." He said nothing, but slightly grasped the witness's hand. The same person helped him out of bed to make water between six and seven on the same afternoon, to whom he said, "It's all up with me!" After lifting him into bed again, the witness began a conversation, on which the deceased made a statement as to the party who had fired the shot. The witness said that the deceased was very serious at this time, and appeared to be sinking very fast; his manner was that of a man in a dying state. Shortly afterwards the witness proposed to fetch a priest, to which the deceased replied, "That's not of much use." The witness then asked him if he had any objection to make a deposition to a magistrate; to which he replied "No!" Being informed that a magistrate was in the next room, he said, "Not yet." It did not appear that he spoke any more; he then seemed to be in a state of much suffering, and he died about half-past nine the same evening. The deceased was a Roman Catholic, but no priest lived nearer to the deceased than fourteen or fifteen miles, and he had attended the parish church and an Independent meeting more than once. Williams, J., received the evidence, but reserved the point for the consideration of the judges, before whom the case was argued in Hil. T. 1845. The judges held the evidence admissible, Lord Denman, C. J., observing, "there was danger, and the deceased was told so, and there is abundant evidence that he had no hope of recovery." *William Howell's case, 2 Carr. & K.* 689, *S. C.* 1 *Den. C. C. R.* 1.

Interval of time between the declaration and death.] With respect to the interval of time which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone, nor is it consistent with the principle upon which dying declarations are received (which, as we have seen, depends upon the state of the declarant's mind), that such declarations should be excluded, if not made within any precise limits of time. It seems, however, that it ought to appear that the deceased believed his dissolution impending. And unquestionably, the length of time may be a material consideration, in forming an inference as to the state of mind of the deceased with respect to his expectation of death, at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation. 1 *Phill. Ev.* 298, 8*th ed.*, 285, 9*th ed.* Where, on the day of receiving the injury, the deceased said he should not get better, and continued to say so to his nurse till the day of his death, which occurred eleven days afterwards; it was held, that a declaration made on the day of

his receiving the injury, was inadmissible, although he had never expressed to the surgeon who attended him any opinion either of hope or apprehension, and although the surgeon thought there was a probability of recovery till the day before his death, which opinion, however, was not communicated to the patient. *Mosley's case*, 1 *Moo. C. C.* 97. But where the proof of the deceased's knowledge of his situation was, that he said "he should never recover;" Hullock, B., rejected the declaration made seven days before the death of the party, observing, "The principle on which declarations *in articulo mortis* are admitted in evidence, is that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that, ultimately, he shall never recover, but that would not be sufficient to dispense with an oath." *Van Butchell's case*, 3 *C. & P.* 631. Where, however, the party being confined to his bed, said to his surgeon, "I am afraid, doctor, I shall never get better," and soon afterwards made a statement and died; Hullock, B., admitted this as a dying declaration, although made several weeks before his death. *Craven's case*, 1 *Lewin, C. C.* 77. The surgeon said to the party, "You are in great danger;" to which he answered, "I fear I am;" and after this made a statement. Though he afterwards recovered so far as to think himself out of danger, the statement was admitted by Bayley, J. *Simpson's case*, 1 *Lewin, C. C.* 78. But see *Errington's case*, *ante*, p. 31, *contrà*. The deceased asked the surgeon, "Shall I recover?" He replied, "No." The patient grew better, and the surgeon changed his opinion, and thought she might get better. The deceased then had a relapse, and again asked the surgeon if she should recover. He replied, "I think you will not recover;" to which she rejoined, "I think so too." It was after this conversation, but not immediately, that the declaration was made. The surgeon had attended the woman until her death, but not regularly. The question as to recovery was not repeated at any of his subsequent visits. Alderson, B., after consulting Patteson, J., admitted the declaration. *Ashton's case*, 2 *Lewin, C. C.* 147. See also *Smith's case*, 1 *Lewin, C. C.* 81; *Bonner's case*, *ante*, p. 29.

Dying declarations—where reduced into writing.] Where the deceased made three several declarations at three several times in the course of the same day, as to the cause of the injury he had sustained; and the first and third accounts were not reduced into writing, but the second was taken down in writing, in the presence of a magistrate, by the same person to whom the former account was given; the account in writing being retained by the magistrate, who was not called; it was held (*Pratt, C. J., diss.*), that the accounts given by the deceased were distinct facts, and that there was no reason to exclude the evidence as to the first and third declarations, because the prosecutor was disabled from giving an account of the second. *Reason's case*, 1 *Str.* 500; 16 *How. St. Tr.* 31, *S. C.* If the statement of the deceased has been taken on oath before a magistrate, and is inadmissible as a deposition in consequence of the prisoner not having been present when it was taken, it may be received as a declaration *in articulo mortis*, if taken under such circumstances, as would render such a declaration admissible in evidence. *Dingler's case*, 2 *Leach*, 561. The prisoner was indicted for wilful murder. Depositions of the deceased, taken in writing by a magistrate, in the hospital where he lay, but not in the presence of the prisoner, were

offered in evidence. It being objected that these depositions could not be read, as not having been taken pursuant to the statute 10 Car. c. 1 (Irish), Downs, J., ordered the magistrate to be sworn, and he having deposed that the deceased, at the time of making those depositions, was impressed with the fear of immediate death, his parol testimony of the facts declared by the deceased was admitted. *Callaghan's case, Cork Ass.* 1793; 1 *M'Nally*, 385.

Where a dying declaration has been reduced to writing and signed by the deceased, neither a copy of the paper, nor parol evidence of its contents, can be received. *Per Coleridge, J., Gay's case*, 7 *C. & P.* 230. See also *Trowter's case*, 10 *Vin. Abr.* 118; *East, P. C.* 356.

Dying declarations—degree of credit to be given to.] With respect to the effect of dying declarations, it is to be observed, that although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *Crockett's case*, 4 *C. & P.* 544, *ante*, p. 31, where the declaration was, "that damned man has poisoned me." Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered, that they cannot be subjected to the power of cross-examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security also, which courts of justice have in ordinary cases, for enforcing truth, by the terror of punishment and the penalties of perjury, cannot exist in this case. The remark before made, on verbal statements which have been heard and reported by witnesses, applies equally to dying declarations; namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding, or from infirmity of memory. In one of the latest cases upon the subject, this species of proof is spoken of as an anomaly and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. *Per Coleridge, J., Spilsbury's case*, 7 *C. & P.* 196; 1 *Phill. Ev.* 305, 8*th ed.*, 293, 9*th ed.* "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full

investigation by the means of cross-examination." *Per Alderson, B.*, *Ashton's case*, 2 *Lewin, C. C.* 147.

Dying declarations—evidence in answer to proof of.] Dying declarations are, of course, open to direct contradiction in the same manner as any other part of the case for the prosecution; and as a prisoner is at liberty to show that a prosecutor who appears in court against him, is not to be believed upon his oath (see *post*), he seems to be equally at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. In *Macarthy's case, Glouc. Summer Ass.* 1842, the case on the part of the prosecution was, that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police. Erskine, J., permitted the prisoner's counsel to cross-examine the witnesses for the prosecution, as to the bad character of the deceased, in order to show that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him. 2 *Russell on Crimes, by Greaves*, 764. As the declarations of a dying man are admitted on a supposition that, in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence, may enter into the particulars of his state of mind and of his behaviour in his last moments, and may be allowed to show that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution. 1 *Phill. Ev.* 228, *7th ed.* See also 1 *Phill. Ev.* 298, *9th ed.*

CONFESSIONS.

Ground of admissibility.] THE confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, *viz.*, the presumption that a person will not make an untrue statement against his own interest. 1 *Phill. Ev.* 397, *9th ed.*

Effect of, in general.] A voluntary confession made by a person who has committed an offence, although not conclusive, is evidence against him, upon which he may be convicted, notwithstanding the confession is totally uncorroborated by other evidence. *Wheeling's case*, 1 *Leach*, 311 (*n*). And even where there is no other proof of the *corpus delicti*; as where, on an indictment for robbery, the party robbed did not appear at the trial, it was held by the twelve judges, that the prisoner was properly convicted on his own confession. *Falkner's case*, *Russ. & Ry.* 481. See also *White's case*, *Id.* 508; *Tippet's case*, *Id.* 509.

In 2 *Russ. by Grea.* 824 (*b*), however, the editor, after referring at length to the foregoing cases, and to *Tuff's case*, 5 *C. & P.* 167, observes, "It does not, therefore, appear that it has ever been expressly *decided*, that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction." See also *Edgar's case, Monmouth Spr. Ass.* 1831, 2 *Russ. by Greaves*, 826, where Patteson, J., said, "Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could."

With regard to the degree of credit, which a jury ought to attach to a confession, much difference of opinion has existed. By some, it has been considered as forming the highest and most satisfactory evidence of guilt. *Grose, J., delivering the opinion of the judges in Lambe's case*, 2 *Leach*, 551. The voluntary confession of the party in interest, says Chief Baron Gilbert, is reckoned the best evidence; for, if a man swearing for his interest can give no credit, he must certainly give most credit when he swears against it. *Gilb. Ev.* 137. So it is stated by the court in *Warickshall's case*, 1 *Leach*, 263, that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. On the other hand, it is said by Mr. Justice Foster (*Discourses*, 243), that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted. This opinion has also been adopted by Sir W. Blackstone. 4 *Com.* 357. It has been said, that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. 1 *Phill. Ev.* 110, 7*th ed.* It cannot be doubted, however, that instances have occasionally occurred, in which innocent persons have confessed themselves guilty of crimes of the gravest nature. Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards, it appeared that Mr. Harrison was alive. *MS. case, cited*, 1 *Leach*, 264 (*n*). Mr. Phillipps also, after stating that in criminal cases a confession carries with it a greater probability of truth than a confession in civil suits, the consequences being more serious and highly penal "*habemus optimum testem, confitentem reum*," adds, "but it is to be observed there may not unfrequently be motives of hope and fear, inducing a person to make an untrue confession, which seldom operate in the case of admissions. And further, in consequence also of the universal eagerness and zeal which prevail for the detection of guilt when offences occur of an aggravated character, in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes, the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. See *per Alderson, B., Simons' case*, 6 *C. & P.* 541; also 5 *C. & P.* 542. For these reasons the statements of prisoners are often excluded from being given in evidence in cases where they

would be unobjectionable as the admission of a party to a civil suit." 1 *Phill. Ev.* 397, *9th ed.*

Must be voluntary—cases in which confessions have been held inadmissible after promises, &c.] A confession is not admissible in evidence, unless it was made freely and voluntarily, and not under the influence of promises or threats. "A confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape when it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." *Per cur. Warickshall's case*, 1 *Leach*, 263. The rule extends to all statements by a prisoner which may affect him criminally, though in terms they charge another person; *Enoch's case*, 5 *C. & P.* 540; or purport to be a refusal to confess, *Tyler's case*, 1 *C. & P.* 129 (*n*); *Phill. Ev.* 423, *8th ed.* (*n*).

With regard to what is such a promise or threat as will exclude a confession, it is laid down by Mr. East, 2 *P. C.* 659, that saying to the prisoner, it will be worse for him if he do not confess, or that it will be better for him if he do, is sufficient to exclude the confession, according to constant experience. Thus where a surgeon called in to a prisoner, under a charge of murder, said to her, "You are under suspicion of this, and you had better tell all you know;" and after this the prisoner made a statement to the surgeon, Parke, J., after conferring with Littledale, J., held that evidence of this statement was inadmissible. *Kingston's case*, 4 *C. & P.* 387. So where a constable said to a prisoner charged with larceny, "It is of no use for you to deny it; for there are the man and boy who will say they saw you do it;" a confession made after this, was rejected by Gurney, B. *Mills's case*, 6 *C. & P.* 146. So where the words were, "It would have been better if you had told at first." *Walkley's case*, 6 *C. & P.* 175. So where the prosecutor said, "If you will tell me where the property is, I will be favourable to you;" Gould, J., rejected the evidence, saying, that the slightest hope of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession. *Cass's case*, 1 *Leach*, 293 (*n*). So where the prosecutor, on the prisoner, who had stolen his money, being apprehended, said, "He only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner pulled some money out of his pocket, and said it was all he had left of it; it was held by a majority of the judges that this evidence was inadmissible. *Jones's case, Russ. & Ry.* 152. *Sed vide Griffin's case, Id.* 151, *post*, 51. Where a prisoner in custody said to the officer in charge of him, "If you will give me a glass of gin, I will tell you all about it;" and two glasses of gin being given to him, he made a full confession of his guilt, Best, J., considered it as very improperly obtained and inadmissible in evidence. *Sexton's case, Chetw. Burn. tit. Confession.* But the authority of this case has been doubted by an able text-writer. 1 *Deacon, Dig. Cr. Law*, 424 (*n*). It certainly differs from the former decisions, in the circumstance of the offer to confess coming, in the first instance, from the prisoner. So where a confession is made with a view, and under the hope, of being thereby permitted to turn king's evidence, it is not admissible. *Hall's case, cited* 2 *Leach*, 5[illegible]. Though if he is admitted, and refuses to give evidence on the trial of his accomplices, he may be convicted upon such confession. *Burley's case, Stark. Ev.* part iv. p. 23, 1*st ed.* See also *Moore's case*, 2 *Lewin, C. C.* 37.

The mere knowledge by a prisoner of a hand-bill, by which a government reward and a promise of pardon are held out to any accomplice, not being the party who committed the murder, does not furnish sufficient grounds for rejecting a confession of a prisoner, unless it appears that the inducements so held out were those which led him to confess. But where this was not distinctly shown, and a statement made by the prisoner to a constable was received in evidence, and it was afterwards proved by another constable that the prisoner, on the night before he made the statement, said that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter; Cresswell, J., struck the statement so received out of his notes. *Boswell's case*, 1 *Carr. & M.* 584. And see also a similar ruling by Talfourd, J., in *Blackburn's case*, 6 *Cox, C.C.* 333.

The confession of a servant girl, fifteen years old, occasioned by repeated applications by a neighbour of the prosecutor and by his wife's mother, amounting to threats and promises, was held by the judges to be inadmissible. *Simpson's case*, 1 *Moo. C. C.* 410. The prisoner, a servant girl aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered her mistress said to her, "Mary, my girl, if you are guilty do confess; it will perhaps save your neck: you will have to go to prison; if W. H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. The mistress then said, "Pray tell me if you did it?" The prisoner then confessed. The point being reserved, the judges thought the confession ought not to have been received. *Upchurch's case*, 1 *Moo. C. C.* 465. A confession made by a girl aged thirteen, after being told by a medical man in the presence of the prisoner's mistress and her husband, that it would be better for her to tell the truth, was held by the Court of Criminal Appeal to be inadmissible. *Garner's case*, 1 *Den. C. C. R.* 329. On the examination of the prisoner before the committing magistrate upon a charge of felony, the magistrate's clerk told him not to say anything to prejudice himself, as what he said would be taken down "and used for him or against him at his trial." Coleridge, J., ruled that this was an inducement to the prisoner to make a confession held out by a person in authority, and that the prisoner's statement which had been taken down and signed, could not be received in evidence. *Drew's case*, 8 *C. & P.* 140. So where a constable told the prisoner, "What you are charged with is a very heavy offence, and you must be careful in making any statement to me, or anybody else, that may tend to injure you; but anything you can say in your *defence* we shall be ready to hear or send to assist you;" the same learned judge held, that a confession made to the constable, was inadmissible. *Morton's case*, 2 *Moo. & R.* 514. But see *Baldry's case*, 2 *Den. C. C. R.* 430, *post*, p. 40, where this and *Drew's case* were disapproved of by Campbell, C. J., Pollock, C. B., Parke, B., and Erle, J. A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman, J., held that this was such an inducement to confess as would render inadmissible any statement

that the prisoner made respecting the fire, as the whole was to be considered as one transaction. *Ann Hearn's case*, 1 *Car. & M.* 109. If a confession has been obtained from a prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted. *White's case, M. T.* 1800. The prosecutor is bound to satisfy the judge that the confession which is sought to be used against the prisoner, was *not* obtained from him by improper means. *Per Parke, B.*, in *Warringham's case*, 2 *Den. C. C. R.* 447. It is a question for the judge in every case, whether the alleged words of inducement were actually such as to induce the prisoner to make a confession of guilt. *Per Erle, J.*, in *Garner's case*, 1 *Den. C. C. R.* 329.

Must be voluntary—cases in which confessions have been held admissible.] It is not every hope of favour held out to a prisoner, that will render a confession afterwards made by him, inadmissible; the promise must have some reference to his escape from the charge. Thus where a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, "If you will tell where the property is, you shall see your wife;" Patteson, J., held, that a confession made afterwards, was admissible. *Lloyd's case*, 6 *C. & P.* 393.

In *Baldry's case*, 2 *Den. C. C. R.*, 430. *S. C.* 21 *L. J. M. C.* 130, all the authorities upon this point, were brought before the Court of Appeal, in the argument of the prisoner's counsel. The confession, which that court unanimously held to have been rightly received in evidence at the trial, was made to the police constable, who having apprehended the prisoner on a charge of murder, said to him, that "he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him," and thereupon the prisoner made the confession.

To invalidate a confession, the threats or promises must have reference to some temporal advantage. Where a prisoner accused of murder, had repeated interviews with a clergyman, who urged him to repentance, telling him that "before God it would be better for him to confess his sins," that "his fears respecting his participation in the dreadful deed were fully confirmed, and that, while he was in that state of mind, he (the chaplain) could afford him no consolation by prayer," and subsequently to these exhortations, the prisoner made a confession; the judges were unanimously of opinion that it was properly received in evidence, and the prisoner was executed. *Gilham's case*, 1 *Moo. C. C.* 186; 2 *Russ.* 648, *S. C.* The prisoner being charged with setting fire to an outhouse, her mistress pressed her to confess, telling her amongst other things, that if she would repent and confess, God would forgive her, but she concealed from her that she herself would not forgive her. The prisoner having confessed, another person, the next day, in her mistress's sight, though out of her hearing, told her that her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J., admitted the confession, and the prisoner was convicted. The jury on having the confessions put to them, thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the judges were of opinion, that these points were not for the jury; but that if Lord Eldon agreed with the jury (which he did), the confessions were not receivable; but many of the judges thought the expressions not

calculated to raise hopes of favour here, and if not, the confessions were evidence. *Nute's case, Chetw. Burn, tit. Confession; 2 Russ.* 648. In the following cases the circumstances were held not to operate as a threat or promise. The chief officer of the police at Liverpool, stated that on the 18th of November, the prisoner was apprehended by his direction without any warrant, between twelve and one o'clock; and that he was carried to the police office about one o'clock. The magistrates were then sitting a very short distance off, and continued sitting till between two and three, but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell of his own authority, between four and five o'clock, and between five and six o'clock he told the prisoner, that in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire, and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The officer replied that he would not have told so many falsehoods as he had, if he had not been concerned in it, and he again asked him if anybody had induced him to do it? The prisoner then began to cry and made a full confession. The prisoner was taken before he had dined, and had had no food from the time he was apprehended until after his confession. Mr. Justice Bayley thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and where the conduct of the officer was likely to intimidate, was admissible in evidence: and reserved the point for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. Best, C. J., Bayley, and Holroyd, JJ., were of a contrary opinion. *Thornton's case*, 1 *Moody, C. C.* 27. On a prisoner being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was enough against him to send a bill before the grand jury; upon which the prisoner immediately made a confession. The reception of the confession was objected to, on the ground of its having been made upon a threat; but Parke, J., overruled the objection, saying that he rather considered it as a caution. *Wright's case*, 1 *Lewin, C. C.* 48. Where a prisoner charged with arson, was told "that there was a very serious oath laid against her by B. B., who had sworn that she had set fire to C.'s rick;" a confession afterwards made by the prisoner, was received in evidence. *Long's case*, 6 *C. & P.* 179. So where on a similar charge the prisoner was told, "You ought to have known better; tell me the truth whether you did so, or not," and she said, "I am innocent;" and she was then told, "Don't run your soul into more sin, but tell the truth," whereupon she made a confession, it was held to be admissible. *Skeeman's case*, 1 *Dears. C. C. R.* 249. A boy not fourteen was charged with murder. A man who was present when he was taken up, but who was not a constable, said to him, "Now kneel you down by the side of me and tell me the truth." The boy having knelt down the man continued, "I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty." The boy having made certain statements in answer to questions thus put to him, their admissibility in evidence was reserved for the consideration of the judges, who were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. The prisoner's

life was saved, and he was transported for life. *Wild's case*, 1 *Moody, C. C.* 452. Where the committing magistrate told the prisoner "to be sure to tell the truth," upon which the prisoner made a statement, it was held that such statement was admissible in evidence. *Court's case*, 7 *C. & P.* 486, *per Littledale, J.* See also *Baldry's case, supra*, p. 40. Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prison, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said that there had; but he hoped that A. would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act and desire. When A. saw the magistrate, he said that no person had held out any inducement to him to confess anything, and that what he was about to say was his own voluntary act and desire. The statement thereupon made by A. was held by Pollock, C. B., to be admissible against him on his trial for murder. *R.* v. *Dingley*, 1 *C. & K.* 637.

An inducement held out to a prisoner with reference to one charge, will not exclude a confession of another offence of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf, that one of them had improperly induced him to confess, and this constable was called and stated that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted, that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. *Warner's case, Glouc. Spr. Ass.* 1832, 2 *Russ. by Greaves*, 845. But where a threat was held out to a prisoner without the nature of the charge being stated, but subsequently the nature of the charge was stated, and thereupon a confession was made, it was held to be inadmissible; *Luckhurst's case*, 1 *Dears. C. C. R.* 245; and if several felonies form part of the same transaction, an inducement held out as to one will exclude a statement as to another; see *Ann Hearn's case, ante*, pp. 39, 40.

Inducement to confess—where held to have ceased.] Although a confession made under the influence of a promise or threat is inadmissible, there are yet many cases in which it has been held, that notwithstanding such threat or promise may have been made use of, the confession is to be received, if it had been made under such circumstances as to create a reasonable presumption, that the threat or promise had no influence, or had ceased to have any influence, upon the mind of the party.

Thus if the impression that a confession is likely to benefit him has been removed from the mind of a prisoner, what he says will be evidence against him, although he has been advised to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these

circumstances was held by Mr. Justice Bayley to be clearly admissible. *Lingate's case*, 1815; *Phill. Ev.* 431, *8th ed.* So where it appeared that a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and again in prison, to another magistrate; the judges unanimously held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *Rosier's case, East. T.* 1821; 1 *Phill. Ev.* 431, *8th ed.*, 411, *9th ed.* So it has been held to be no objection to a confession made before a magistrate, that the prosecutor, who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out; as the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper. *Edwards' case, East. T.* 1802; 1 *Phill. Ev.* 431, *8th ed.*, 411, *9th ed.* A prisoner charged with murder was visited by a magistrate, who told him that if he was not the man who struck the fatal blow, he would use all his endeavours and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder. The magistrate wrote to the secretary of state, who returned an answer, that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. Littledale, J., ruled that a confession subsequently made by the prisoner to the coroner was admissible; for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. *Clewes's case*, 4 *C. & P.* 224. See also *Howes' case*, 6 *C. & P.* 404. A girl charged with poisoning was told by her mistress, that if she did not tell all about it that night, the constable would be sent for next morning to take her to S. (meaning before the magistrate there); upon which the prisoner made a statement. The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrates, without any inducement from the constable, she confessed to him. Bosanquet, J., said, "I think this statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be taken before the magistrates. Now she must have known when she made this statement, that the constable was taking her to the magistrates. The inducement therefore was at an end." *Richards's case*, 5 *C. & P.* 318.

Inducement to confess—where held not to have ceased.] It is said by Mr. Justice Buller, that there must be very strong evidence of an explicit warning by a magistrate not to rely on any expected favour, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence. 2 *East, P. C.* 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained, by giving the prisoner two glasses of gin, the officer to whom it had been made, read it over to the prisoner before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The

prisoner said, that what had been read to him was the truth, and signed the papers. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner, that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. *Sexton's case, Burn, tit. Confessions.* So where the committing magistrate told the prisoner, that if he would make a confession, he would do all he could for him, and no confession was then made, but after his committal, the prisoner made a statement to the turnkey, who held out no inducement and gave no caution; Parke, J., said he thought the evidence ought not to be received after what the committing magistrate had said to the prisoner, more especially as the turnkey had not given any caution. *Cooper's case, 5 C. & P.* 525.

A constable having a search warrant found in the prisoner's house the two hams charged in the indictment, and thereupon, in the presence of one of the prosecutors, said to the prisoner, "You had better tell all about it." The prisoner then made a confession, which, it was admitted, could not be given in evidence. In the afternoon of the same day another of the prosecutors went to the prisoner's house and entered into conversation with her about the hams, when she repeated the confession she had made to the constable in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said that the second confession was not receivable, it being impossible to say, that it was not induced by the promise which the constable made to the prisoner in the morning. *Meynell's case, 2 Lewin, C. C.* 122.

The prisoner, who was indicted for murder, worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, that there was no doubt he would be found guilty: it would be better for him if he would confess. A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." The overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, who stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house and there said, "I believe Sherington has murdered a man in a brutal manner." That the wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything, but did not caution him. That it was not more than five minutes after he received the prisoner into his charge,

that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement, and that the overlooker was not present when the statement was made.' Patteson, J., rejected the second confession, saying, "There ought to be strong evidence to show that the impression, under which the confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." *Sherington's case*, 2 *Lewin*, *C. C.* 123. A female servant being suspected of stealing money, her mistress on a Monday, told her that she would forgive her if she told the truth. On the Tuesday, she was taken before a magistrate, and no one appearing against her, was discharged. On the Wednesday, being again apprehended, the superintendent of police went with her mistress to the bridewell, and told her, in the presence of her mistress, that she "was not bound to say anything, unless she liked; and that if she had anything to say, her mistress would hear her," but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement, it might be given in evidence against her. The prisoner then made a statement. Patteson, J., held, that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement; but that if the mistress had not been then present, it might have been otherwise. *Hewitt's case*, 1 *Car. & M.* 534.

If the confession of a prisoner taken before a magistrate, has on the face of it a statement that the first caution required by 11 & 12 Vict. c. 42, s. 18, has been given, it is receivable in evidence. *Sansome's case*, 1 *Den. C. C. R.* 545. But Erle, J., added, that inasmuch as it was not yet decided, whether the second caution mentioned in that section was requisite when a previous inducement or threat had been held out, it would be prudent in justices always to give the prisoner the second caution. See *post*, *Examination of the Prisoner*, p. 58.

Where the inducement to confess has proceeded from third parties, in the presence of persons having authority.] A confession made on an inducement held out by a person without authority, but in the presence of a party who has authority and who gives no caution and expresses no dissent, is inadmissible in evidence.

Where it appeared, that the constable had taken the prisoner to a public-house, and the latter, in consequence of inducements held out by the innkeeper, made a confession to him, in the presence of the constable, who did not caution the prisoner in any way; Alderson, B., expressed a very strong opinion against its admissibility; but as there were opinions, which he was bound to respect, opposed to his own, his lordship thought he had better receive the evidence, and, if necessary, reserve the point for the consideration of the judges. The prisoner was acquitted. *Pountney's case*, 7 *C. & P.* 302. A married woman was apprehended on a charge of felony, and her husband, in the presence of the constable, held out an inducement to her to confess; Pollock, C. B., held that this rendered a confession thereupon made, inadmissible in evidence. *Laugher's case*, 2 *C. & K.* 225. In *Sarah Taylor's case*, 8 *C. & P.* 733, the prisoner, a female servant, was sent for into the parlour, where a person, not in authority, in the presence of the prosecutor's wife, held out an inducement to the

prisoner to confess, the wife expressing no dissent. Patteson, J., said, that the inducement must be taken as if held out by the prosecutor's wife, who was a person in authority over the prisoner, and that therefore the evidence was inadmissible. ¶In *Luckhurst's case*, 1 *Dears. C. C. R.* 245; *S. C.* 23 *L. J. M. C.* 18, a confession made under similar circumstances, was held by the Court of Criminal Appeal to be inadmissible. On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess had been held out in their absence by the wife of one of them who assisted in the management of their business, was held by Parke, B., to be inadmissible. *Warringham's case*, 2 *Den. C. C. R.* 447.

Where the inducement to confess has proceeded from persons having no authority.] Until recently, it was a matter of doubt whether a confession is receivable in evidence, where the promise or threat proceeds from a person who has no power to enforce it, and who possesses no control over the prisoner. Where some neighbours, who had nothing to do with the apprehension, prosecution, or examination of a prisoner, officiously interfered and admonished him to tell the truth and consider his family, and no answer was made either by the constable or the prisoner, but the latter, an hour afterwards, confessed to the constable in prison; the confession was held by the judges to be admissible, because the advice to confess was not given or sanctioned by any person that had any concern in the businss. *Row's case*, *Russ. & Ry.* 153; *Phill. Ev.* 428, 8*th ed. S. C.* So where the counsel for a prisoner objected to the admissibility of a confession made before the committing magistrate, and offered to prove that the wife of the constable had told the prisoner some days before the commitment, that it would be better for him to confess; Wood, B., overruled the objection, and admitted the confession. *Hardwicke's case*, *Nott. Lent Ass.* 1811; *Phill. Ev.* 429. And where a witness stated, that he had held out no threat or promise to induce the prisoner to confess, but that a woman who was present said, that she had told the prisoner that she had better tell all, upon which the prisoner made certain confessions to the witness; Park, J., after consulting with Hullock, B., ruled, that as no inducement had been held out by the witness to whom the confession was made, and as the only inducement had been held out by a person having no sort of authority, it must be presumed that the confession to the witness was free and voluntary. If the promise had been held out by any person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here a person having no authority of any sort, officiously says, "You had better confess;" no confession follows, but some time afterwards the prisoner, without any inducement held out, confesses to another person. *Gibbon's case*, 1 *C. & P.* 97. So where it appeared that the prisoner was told by a man, that another prisoner had told all and that he had better do the same to save his neck, upon which he confessed to the constable; Hullock, B., held, that as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence. *Tyler's case*, 1 *C. & P.* 129. The wife of a person in whose house an offence is committed, such person not being the prosecutor nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected

with the management of the house, is not a person in authority within the rule which excludes confessions. *Hannah Moore's case*, 2 *Den. C. C. R.* 522; *S. C.* 21 *L. J. M. C.* 199.

In *Spencer's case*, 7 *C. & P.* 776, Parke, B., stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, can be given in evidence; and the learned judge intended, had the evidence been pressed, to have received it, and reserved the point. But on the last-mentioned case being cited in *Sarah Taylor's case*, 8 *C. & P.* 733, Patteson, J., said, "It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority." And in *Sleeman's case*, 1 *Dears. C. C. R.* 248; *S. C.* 23 *L. J. M. C.* 19, where the prisoner was a maid servant charged with setting fire to some farm-buildings of her master, it was held that his daughter was not a person in authority over the prisoner, so as to exclude a statement made in consequence of any inducement to confess held out by her. However, in that case the court likewise held, that there had not in fact been any sufficient threat or inducement. But see *Taylor on Ev.* 700, 2*nd edit.*

Confessions obtained by artifice, or deception, admissible.] Where a confession has been obtained by artifice, or deception, but without the use of promises or threats, it is admissible. Thus it has been held, that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, and even though some artifice has been used to draw him into that supposition. *Burley's case, East. T.* 1818; *Phill. Ev.* 427, 8*th ed.*, 406, 9*th ed.* So if a prisoner makes a confession under the hope, held out by of a person not in authority, that he will thereby be admitted as queen's evidence, it is receivable against him. *R.* v. *Berigan, Ir. Cir. R.* 177 (cited in *Taylor on Ev.* 705, 2*nd edit.*). Where a prisoner asked the turnkey if he would put a letter into the post, and, on receiving a promise that he would do so, gave him the letter, which was detained by the turnkey and given in evidence as a confession at the trial; Garrow, B., received the evidence. *Derrington's case*, 2 *C. & P.* 418. So where a person took an oath that he would not mention what the prisoner told him; *Shaw's case*, 6 *C. & P.* 373; and where a witness promised that what the prisoner said should go no further; *Thomas's case*, 7 *C. & P.* 345. Also where a constable, in order to extract a confession, assumed the prisoner's guilt, and asked how she came to poison her uncle, the confession in answer was received. *Per Littledale, J., Warwick Assizes.* 1 *Phill. Ev.* 427, 8*th ed.*, 406, 9*th ed.* It appeared that one of the prisoners had made a statement to a constable in whose custody he was, but that he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so. On its being objected that what a prisoner said under such circumstances was not receivable in evidence, Coleridge, J., said, "I am of opinion, that a statement made by a prisoner while he was drunk, is not therefore inadmissible; it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." *Spilsbury's case*, 7 *C. & P.* 187.

Confessions obtained by questioning admissible.] A confession is admissible in evidence where it has been elicited by questions put

by a person having no authority. *Wild's case*, 1 *Moo. C. C.* 452, *ante*, p. 41. So where the party asking them is a police officer; *Thornton's case*, 1 *Moo. C. C.* 27, *ante*, p. 41. See also *case at Warwick Assizes, supra.* But the practice is reprobated by most of the judges; and in a recent case where it appeared that the constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office. *Hill's case, Liverpool Spring Assizes*, 1838, *MS.* See also *Kerr's case*, 8 *C. & P.* 176.

Must be voluntary—cases where witnesses have made statements, and afterwards have themselves been tried for the offence.] A question sometimes arises, whether a statement which has been made by a party upon his examination as a witness, can be given in evidence against him, if he should himself be put upon his trial for the same offence. The general rule is, that admissions made under compulsory process, are evidence against the party. *Rosc. Dig. Ev. N. P.* 36. So it is said by Mr. Starkie, that when a witness answers questions upon his examination on a trial, tending to criminate himself and to which he might have demurred, his answers may be used for all purposes. 2 *Stark. Ev.* 28, *2nd ed.* Thus upon an indictment against a magistrate for misconduct in his office, Lord Tenterden (then Mr. J. Abbott) permitted evidence to be given of what he had said upon his examination before a committee of the House of Commons, although it was objected that, as that examination was compulsory, his admission could not be voluntary. *Merceron's case*, 2 *Stark. N. P.* 366. But see *Gilham's case*, 1 *Moo. C. C.* 203, where Lord Tenterden, C. J., said, that he thought there must be some mistake in the above case, and that the evidence must have been given without oath, and before a committee of inquiry where the witness would not be bound to answer. Where a person was brought up as a witness on an inquiry respecting a fire, but attempting to run away, was detained by a constable; a statement made by him to the constable was received in evidence against him for the arson, and he was convicted and executed. *Swatkins' case*, 4 *C. & P.* 548. So where the prisoner had made a statement upon oath at a time when he was not under any suspicion, Vaughan, B., thought it receivable in evidence. *Tubby's case*, 5 *C. & P.* 530. But in another case, where the prisoner had been examined on oath as a witness, touching a charge of poisoning, and at the conclusion of the examination was herself committed for trial on the charge; upon her deposition being tendered in evidence as a confession, Gurney, B., is reported to have said, "This being a deposition made by the prisoner at the same time as all the other depositions, on which she was committed, and on the very same day on which she was committed, I do not think the examination was perfectly voluntary." *Lewis's case*, 6 *C. & P.* 161. So where one of the prisoners was examined as a witness against the other before the magistrate, and after being examined, was committed for trial; Gurney, B., held, that what she said before the magistrate as a witness, could not be given in evidence against her on the criminal charge. *Davis's case*, 6 *C. & P.* 177. Also where, on an indictment for murder, it was opened that the only evidence to affect the prisoner, was a statement made by him before the coroner at the inquest, which purported on the face of it to have been taken on oath, but had not been so taken in fact, Alderson, B., rejected it, observing, "As this

statement purports to be a statement on oath, I cannot receive it as evidence against the prisoner; and I think, as it so purports, I cannot allow parol evidence to be given to show that the statement was not made upon oath." *Wheeley's case*, 8 *C. & P.* 250. In *Owen's case*, 9 *C. & P.* 83, which was a charge of rape, upon the depositions of the prisoners, taken on oath before the coroner, and while they were in custody, being offered in evidence; Williams, J., received them, and reserved the point. The prisoners, however, were acquitted. Being subsequently tried for the murder of the same party before Gurney, B., that learned judge rejected the depositions. 9 *C. & P.* 239.

These latter decisions are at variance with other cases. Where a prisoner, indicted for murder, had been examined upon oath before the coroner on a charge against another person; Parke, J., received evidence of the examination as a confession; observing, that upon that, as upon every other occasion, the prisoner might have refused to answer any questions having a tendency to expose him to a criminal charge, and not having done so, his examination was evidence against him. *Howarth's case*, *Greenwood's Col. Stat.* 138 (*n*); 4 *C. & P.* 254. So on an indictment for murder where the female prisoner had been examined on oath before the coroner (another party being then in custody upon the charge); Erskine, J., received her deposition in evidence against her, but reserved the point. The prisoner, however, was acquitted. *Sandy's case*, 1 *Carr. & M.* 347. The prisoner was indicted for forgery, and it was proposed to give in evidence against him his examination on oath before commissioners of bankrupt. For the prisoner it was contended, that it could not be received, the examination being compulsory, and that if a party refused to answer the questions put to him he was liable to be sent to prison under the authority of the 6 Geo. 4, c. 16, s. 36. Coleridge, J., received the evidence, and the prisoner was found guilty. The point was reserved for the opinion of the judges, who held that the evidence was admissible. *Wheater's case*, 2 *Lewin, C. C.* 157; 2 *Moo. C. C.* 45. In *Britton's case*, 1 *Moo. & R.* 297, which has sometimes been cited on this point, Patteson, J., after consulting Alderson, B., held, that the balance-sheet of a bankrupt given on oath under his commission, was not admissible on an indictment against him for concealing his effects; but in *Wheater's case*, 2 *Moo. C. C.* 51, Patteson, J., stated that the ground of that decision was, that the balance-sheet could not be given in evidence, unless there was a valid commission, and, therefore, the balance-sheet, being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt as a part of the commission. By s. 117 of the Bankrupt Consolidation Act, 1849, a court of bankruptcy is empowered to examine a bankrupt as to certain matters "relating to his trade, &c.," and the bankrupt is compelled to answer such questions. If, however, without claiming his privilege of refusing to answer, he answer questions as to matters not within the section, his answers may be given in evidence against him in any criminal proceeding. *Sloggett's case*, 25 *L. J. M. C.* 93. It was unnecessary in deciding that case for the court to express any opinion upon the question whether, where the subject-matter of the examination is strictly within the compulsory powers of the statute, the answers of the bankrupt, given without any protest on his part on a matter upon which he could not protest effectually, can be read in evidence against him. But this point was expressly raised in

Scott's case, 25 *L. J. M. C.* 128, and decided, Coleridge, J., *dissentiente*, in favour of the admissibility of the evidence.

Must be voluntary—evidence of facts, the knowledge of which has been obtained by improper confessions, admissible.] Although a confession obtained by means of promises or threats cannot be received, yet if, in consequence of that confession, certain facts, tending to establish the guilt of the prisoner, are made known, evidence of those facts may be received. "A fact," it is said by the court in *Warickshall's case*, 1 *Leach*, 264, "if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be, in other respects, true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they have been derived." The same doctrine, viz., that no part whatever of the confession is to be received in evidence, was also laid down by Lord Eldon, in the case of Richard Harvey, at Bodmin Summer Assizes, 1800. His lordship said, that where the knowledge of any fact was obtained from a prisoner, under such a promise, as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it. 2 *East, P. C.* 658. The rule, however, as above laid down, appears to be too strict, and accordingly it is said in *Butcher's case*, 1 *Leach*, 265, (*n.*) that it should seem that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true. But this opinion, says Mr. East, (citing several cases) must be taken with some grains of allowance; for even in such case, the most that is proper to be left to the consideration of the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case; and this, he adds, is now the more common practice. 2 *East, P. C.* 658. Upon this it may be observed, that such a confession appears to be evidence only of the *fact* that the prisoner was acquainted with the other fact which he disclosed, and that so far as such knowledge goes, it is evidence to convict him of the offence. Where a prisoner, indicted as a receiver of stolen property, in consequence of promises of favour, made a full confession, and according to that confession, the property was found at her lodgings, concealed between the sackings of her bed; it was held that evidence of the finding was admissible. *Warickshall's case*, 1 *Leach*, 263. So the evidence of a third person, the knowledge of which is got at through a confession obtained by favour, is admissible; as where the prisoner named the person to whom the property had been disposed of, it was held that such person might be called. *Lockart's case*, 1 *Leach*, 386. See also *Mosey's case*, 1 *Leach*, 265 (*n.*) A prisoner had made a statement to a policeman under circumstances that precluded it from being given in evidence, but the statement contained some allusion to a lantern which was afterwards found. Tindal, C. J., and Parke, B., were both of opinion that the words used by the prisoner with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that

the prisoner told him that he had thrown a lantern into a certain pond. The other parts of the statement were not received. *Richard Gould's case*, 9 *C. & P.* 364.

Evidence of acts done in consequence of inducement—not admissible.] It is said in *Warickshall's case*, 1 *Leach*, 265, that although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confessions. It seems, however, that such acts, if they are only tantamount to a confession, and are unsupported by *facts*, are inadmissible. A prisoner charged with stealing, was induced by a promise from the prosecutor to confess, and after confessing, carried the officer to a particular house where he had said he had disposed of the property, and pointed out the person to whom he said he had delivered it. That person denied the fact, and the property was not found. The evidence of the confession was not received; but the evidence of his carrying the officer to the house was. The judges were of opinion that the latter evidence was not admissible. The confession was excluded, because being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner under the same influence, and not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct. *Jenkins' case*, *Russ. & Ry.* 492.

Declarations accompanying the delivery up of stolen property—whether admissible.] Declarations accompanying an act done, that act being corroborated by a fact, have in one case been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory notes. The prosecutor was proceeding to state an improper confession, when Chambre, J., stopped him, but permitted him to prove that the prisoner brought to him a guinea and a 5*l.* Reading Bank note, *which he gave up to the prosecutor, as the guinea and one of the notes that had been stolen from him.* The learned judge told the jury, that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence, that it was the stolen note. A majority of the judges (seven) held the conviction right. Lawrence and Le Blanc, JJ., were of a contrary opinion, and Le Blanc said, that the production of the money by the prisoner was alone admissible, and not that he said it *was one of the notes stolen*. *Griffin's case*, *Russ. & Ry.* 151. And see *Jones's case*, *Russ. & Ry.* 152, *ante*, *p.* 38, where the statement of the prisoner on producing some money out of his pocket, that it was all he had left of it, was held inadmissible, the prosecutor having held out inducements to confess. Speaking of declarations accompanying an act, Mr. Phillipps observes, "it may be thought that the only ground upon which such declarations can be received is, that they are explanatory of the act of delivery, and not a narrative of a past transaction." *Phill. Ev.* 432, 8*th ed.*

Evidence only against the parties making them.] A confession is only evidence against the party himself who made it, and cannot be used against others. *Tong's case*, *Kel.* 18; *Gilb. Ev.* 137. *Hevey's case*, 1 *Leach*, 235. So when it was proposed to be proved on the trial of three prisoners, that on their examination, one of them, who was charged by the examination of another with having jointly com-

mitted the felony in question, did not deny that what was so said was true, Holroyd, J., held that it was not competent to the prosecutor to go into such evidence, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester. *Appleby's case*, 3 *Stark. N. P.* 33. The same principle was acted upon in *Melen* v. *Andrews*, *M. & M.* 336. "The deposition of a witness," says Mr. Justice James Parke, in that case, "taken in a judicial proceeding, is not evidence on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who being a stranger to the matter under investigation, had not the right of interfering, and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interposing when and how he pleases, as he would in common conversation. The same inference, therefore, cannot be drawn from his silence, or his conduct in this case, which generally may from that of a conversation in his presence." But it would be otherwise, if what was said drew any answer from the prisoner; what passed in such a case would be evidence. *See Child* v. *Grace*, 3 *C. & P.* 193. Where on the trial of an information for a libel containing imputations upon the character of the prosecutor, to which there was a plea justifying the libel as true under the 6 & 7 Vict. c. 96, it was sought in proof of the plea to give in evidence that the same imputations on the prosecutor had been previously published in the Dublin Review, with a view of showing, that the prosecutor having submitted to those charges, admitted their truth: the court held that the evidence was rightly rejected. *R.* v. *Newman*, 1 *E. & B.* 268, *S. C.* 22 *Law J. Q. B.* 156. As to confessions and admissions in *Conspiracy*, *vide post.*

Where a confession by one prisoner is given in evidence, which implicates the other prisoners by name, a doubt arises as to the propriety of suffering those names to be mentioned to the jury. On one circuit the practice has been to omit their names; *Fletcher's case*, 4 *C. & P.* 250; but it has been ruled by Littledale, J., in several cases, that the names must be given. Where it was objected on behalf of a prisoner whose name was thus introduced, that the witness ought to be directed to omit their names, and merely say *another person*, Littledale, J., said, "The witness must mention the name. He is to tell us what the prisoner said, and if he left out the name he would not do so. He did not say another person, and the witness must give us the conversation just as it occurred; but I shall tell the jury that it is not evidence against the other prisoner." *Hearne's case*, 4 *C. & P.* 215. *Clewes' case*, *Id.* 225. It is said by Mr. Phillipps, that a distinction might perhaps be taken in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separated, and detached from the rest, and can be omitted without in any degree affecting the prisoner's narrative against himself. 1 *Phill. Ev.* 116, 7*th ed.* Upon this it may be remarked, that the same observation seems equally to apply to confessions not in writing, where the witness might be cautioned not to mention the names of the other prisoners, unless from such omission the confession, as affecting the party making it, should become unintelligible. The rule as laid down by Mr. Justice Littledale, has been acted upon by him in the case of *written* confessions also.

A letter written by one of several prisoners was offered in evidence. It immediately implicated one of the others; and it was objected that the name of all but the prisoner in question should be omitted in the reading. But Littledale, J., ruled the contrary, and said that to make it evidence the whole must be read. *Fletcher's case*, 1 *Lewin, C. C.* 107; 4 *C. & P.* 260, *S. C.* In a later case, before Parke, J., in which *Fletcher's case* was cited, the learned judge said, "I know that is Mr. Justice Littledale's opinion, but I do not like it. I do not think it the fair way." *Barstow's case*, 1 *Lewin, C. C.* 110. Other judges, however, have ruled in the same manner as Mr. Justice Littledale. Alderson, J., *Hall's case*, 1 *Lewin, C. C.* 110. Denman, C. J., *Foster's case*, *Id.*

Upon the same principle, the confession of the principal is not admissible in evidence, to prove his guilt, upon an indictment against the accessory. One Turner was indicted for receiving sixty sovereigns, &c., by one Sarah Rich then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the presence of the prisoner, in which she stated various facts, implicating herself and others, as well as the prisoner. Patteson, J., refused to receive as evidence anything which was said by Sarah Rich respecting the prisoner, but admitted only what she had said respecting herself. The prisoner was convicted. Having afterwards learned that a case had occurred before Mr. Baron Wood, at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty, to establish the fact of the stealing by the principal, as against the receiver, Patteson, J., thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" All the judges having met (except Lord Lyndhurst, C. B., and Taunton, J.), were unanimously of opinion, that Sarah Rich's confession was no evidence against the prisoner, and the conviction was held wrong. *Turner's case*, 1 *Moody, C. C.* 347.

By agents.] In general, a person is not answerable criminally for the acts of his servants or agents, and therefore the declarations or confessions of a servant or agent will not be evidence against him. But it is otherwise, where the declaration relates to a fact in the ordinary course of the agent's employment, in which case such declarations accompanying an act done, will be evidence in a criminal proceeding, as well as in a civil suit. *See Rosc. Dig. Ev. N. P.* 41, *5th ed.* Thus on the impeachment of Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form, by Mr. Douglas, (who was proved to have been appointed by Lord Melville, to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same) was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster, did receive from the exchequer a certain sum of money in the ordinary course of business. 29 *How. St. Tr.* 746.

In what cases a prosecutor may be affected by the acts and declarations of his agents does not appear to be well decided. In the *Queen's case*, the judges held that it was not competent to show that the agent of the prosecutor, not called, offered a bribe to a witness,

who also was not called. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving, therefore, those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His lordship added, that notwithstanding the opinion he had delivered, he was by no means prepared to say that in no case, and under no circumstances, appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature to be submitted to the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the offered proof. 2 *Brod. & Bing.* 302.

The whole of a confession must be taken together.] In criminal, as well as in civil cases, the whole of an admission made by a party is to be given in evidence. *See Rosc. Dig. Ev. N. P.* 50, *5th ed.* The rule is thus laid by Abbott, C. J., in the *Queen's case,* 2 *Brod. & Bing.* 297. If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversasion as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. "There is no doubt," says Mr. Justice Bosanquet, "that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." *Jones's case,* 2 *C. & P.* 629. Where a prisoner was indicted for larceny, and in addition to evidence of the possession of the goods, the counsel for the prosecution put in the prisoner's statement before the magistrate, in which he asserted that he had bought the goods, Garrow, B., is reported to have directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. *Anon. cited arg. Jones's case,* 2 *C. & P.* 630. It must not, however, from this, be supposed that every part of a confession is entitled to equal credit. A jury may believe that which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. Thus in a case similar to that before Mr. Baron Garrow, the prosecutor having put in the prisoner's examination, which merely stated that "the cloth was honestly bought and paid for," Mr. Justice J. Parke told the jury, "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to

acquit him, but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." *Higgins' case*, 3 *C. & P.* 603. So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, Littledale, J., left the confession to the jury, saying, "It must be taken altogether, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it and disbelieve another." *Clewes's case*, 4 *C. & P.* 225. See also *Steptoe's case*, 4 *C. & P.* 397, *S. P.* In a recent trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates as their defence, and show by evidence that they were not consistent with truth; *Greenacre's case*, 8 *C. & P.* 36; and this course is frequently adopted in practice.

Confessions of matters void in point of law, or false in fact.] An admission on the part of a prisoner is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight. Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquitted. 3 *Stark. Ev.* 1187, 1*st ed.* So on an indictment for setting fire to a ship, with intent to injure two part-owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. *Philp's case*, 1 *Moody, C. C.* 271.

Confessions inferred from silence or demeanour.] Besides the proof of direct confessions the conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part. *Smithers' case*, 5 *C. & P.* 332; *Bartlett's case*, 7 *C. & P.* 832. So evidence of a prisoner's demeanour on a former occasion is admissible to prove guilty knowledge; *Tattershall's case*, and *Phillips's case*, *post*, *p.* 88, 89. Mr. Phillipps after remarking that a confession may in some cases be collected or inferred from the conduct and demeanour of a prisoner, on hearing a statement affecting himself, adds, "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanour of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution."

A deposition of a witness, or the examination of another prisoner taken before the committing magistrate, is not admissible in evidence merely because the party affected by it was present, and might have had an opportunity of cross-examining or commenting on the evidence; neither can any inference be drawn, as in other cases, from his silence. *Appleby's case*, 3 *Stark. N. P.* 33; *Melen* v. *Andrews*, *M. & M.* 336, *ante*, p. 52; *Turner's case*, 1 *Moody, C. C.* 347; *Swinnerton's case*, 1 *Carr. & M.* 593, *post*, p. 65.

Confessions taken down in writing.] Where a confession has been taken in writing the document must be produced. In *Swatkins' case*, 4 *C. & P.* 548, a constable wrote down what the prisoner said, and having read it over to him, the latter put his mark to it. The paper was put in and read by the clerk of assize. A written examination will not exclude proof of a confession made previously or subsequently to the prosecutor or any other person. *M'Carty's case, M'Nally on Ev.* 45; and see *Reason's case, ante*, p. 33.

The mode of introducing confessions.] For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. 1 *Phill. Ev.* 409, *9th ed. ante*, p. 41. In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison, to a coroner for whom the prisoner had sent. It however appeared that previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that therefore the counsel for the prosecution were bound to call him. Littledale, J., "As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." *Clewes's case*, 4 *C. & P.* 221. So where a prisoner being in the custody of two constables on a charge of arson, one B. went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess, and *Swatkins' case, post*, p. 57, was relied upon. Taunton, J., "A confession is presumed to be voluntary, unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J., his lordship added, "We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement, otherwise we must in all cases call the magistrates and constables before whom, or in whose custody the prisoner has been." *Williams's case, Glouc. Spr. Ass.* 1832, 2 *Russ. by Greaves*, 870.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed in the first instance by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room the prisoner said he wished to speak to him, and motioned the other constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., "I am inclined to think the constable ought to be called. This is a peculiar case, and can never be

cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables." *Swatkins' case*, 4 *C. & P.* 548. In order to induce the court to call another officer in whose custody the prisoner has been, it must appear either that some inducement has been used by, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable. It was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J., "Although I do not think it necessary that a constable in whose custody a prisoner has been, should be called in every case, yet, as in this case, there is a reference to the constable, I think he ought to be called." Williams was then called, and proved he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J., "I do not think it is necessary that a constable should be called, unless it appear that some promise was given or some express reference was made to the constable. There was a distinct reference made to Williams, and, therefore, I thought he must be called, but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made that might either be a confession, a denial, or an exculpation." *Warner's case, Glouc. Spr. Ass.* 1832, 2 *Russ. by Greaves*, 871.

EXAMINATION OF THE PRISONER.

Statute 11 *&* 12 *Vict. c.* 42.] The foregoing pages relate only to the confessions and admissions made, by persons charged with offences, to third persons, and not made to magistrates during the examinations directed to be taken by statute. Those examinations formerly taken under the 1 & 2 P. & M. c. 13, 2 & 3 P. & M. c. 10, and 7 Geo. 4, c. 64, are now governed by the 11 & 12 Vict. c. 42.

That statute enacts, s. 17, "That in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with *any indictable offence*, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused, as first aforesaid, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid, is dead or so ill as not to be able to travel, and if also it be found that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

And s. 18 enacts, "That after the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall without requiring the attendance of the witnesses read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words to the like effect, 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided nevertheless that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time which by law would be admissible as evidence against such person."

Mode of taking examinations—the caution.] The 28th section of the above statute declares that the forms given in the schedule are to be deemed good, valid, and sufficient in law: and the form in the schedule does not contain the second caution mentioned in s. 18. In *Sansome's case*, 1 *Den. C. C. R.* 545, *S. C.* 19 *L. J. M. C.* 143, the first caution only had been given by the magistrate, and an objection was taken to the admissibility of the statement of the prisoner upon the ground that the second caution should also have been given. It did not appear that any previous threat or inducement had been held out to the prisoner. The Court held the examination admissible: Erle, J., however, intimated that it would be prudent in justices always to give the prisoner the second caution, as being the only course which would preclude all possibility of question as to the admissibility of his statement; for as it was not yet decided whether that caution was absolutely requisite when a previous inducement or threat had been held out, and the justice could never be certain whether such previous threat or inducement had or had not been held out, a perplexing position might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such threat or inducement, should it turn out in fact that either had been held out. In *Bond's case*, 1 *Den. C. C. R.* 517, *S. C.* 19 *L. J. M. C.* 138, Alderson, B., said, "It is difficult to understand the 18th section, unless by supposing the first proviso to apply to a case where the magistrate is made aware that there has been a previous promise or threat made to the prisoner; in which case he is directed to give the second caution;" and accordingly

the examination of the prisoner was admitted in evidence, although the first caution only had been given. In that case the prisoner when before the committing magistrate, and after being cautioned by him in the manner prescribed by the 18th section (omitting the proviso), made a statement which was taken down in writing but not signed by him or the magistrate, being then remanded to a subsequent day he was again brought before the magistrate; no new witnesses were examined, but the prisoner's attorney put some questions to a witness who had been examined before. The prisoner having been again cautioned declined to make any statement; it was held that his statement made in the first examination was admissible in evidence at the trial. "The caution and warning prescribed by the statute is intended to apply to the final proceeding only, when after all the witnesses have been examined the prisoner is asked whether he has anything to say in answer to the charge. This provision of the statute however does not exclude any declaration or voluntary statement made by the party accused before, during, or after the inquiry." *Per Jervis, C. J., Skipp's case*, 25 *L. J. M. C.* 109.

Mode of taking examinations—must not be upon oath.] The examination of a prisoner must not be taken upon oath. Where the examination of a prisoner was produced, commencing—"The examination of A. B., taken on oath before," &c. Le Blanc, J., rejected it, and would not permit evidence to be given that no oath had, in fact, been administered, saying, that he could not allow that which had been sent in under the hand of a magistrate to be disputed. *Smith's case*, 1 *Stark. N. P.* 242. So Parke, J., rejected an examination of the prisoner, concluding "taken and sworn before me," and signed by the magistrate, and would neither allow the magistrate's clerk to prove that, in fact, it was not sworn, nor would he receive parol evidence of what the prisoner said. *Rivers's case*, 7 *C. & P.* 177. So also where the magistrate returned that the prisoner was sworn, Parke, B., in the presence of Bosanquet, J., held that proof could not be received, that, in point of fact, the prisoner was not sworn. *Pikesley's case*, 9 *C. & P.* 124. But where the prisoner, being mistaken for a witness, was sworn, but the mistake being discovered, the deposition, which had been commenced, was destroyed, and the prisoner, subsequently, after a caution from the magistrate, made a statement, Garrow, B., received that statement. *Webb's case*, 4 *C. & P.* 564. And where a prisoner had been examined upon oath on a charge against another person, Parke, J., received evidence of his examination, *as a confession*, observing, that upon that, as upon every other occasion, the prisoner might have refused to answer any questions having a tendency to expose him to a criminal charge, and not having done so, his examination was evidence against him. *Howarth's case, Greenwood's Col. Stat.* 138 (*n*), 4 *C. & P.* 254. See *ante, p.* 49.

Mode of taking—when reduced into writing, and when not.] The statute requires that the examination shall be taken down in writing, and therefore, when reduced into writing, such writing is the best evidence, and parol evidence of the examination cannot be received. In order to render parol evidence of the examination admissible, it must be clearly proved that, in fact, such examination was not reduced into writing. *Jacob's case*, 1 *Leach*, 310. If the examination be not returned, and it is uncertain whether it has been reduced into

writing or not, parol evidence will be rejected. *Hinxman's case, Id.* (*n*). *Fisher's case, Id.* p. 311 (*n*). And it would seem, that in order to render parol evidence of a prisoner's statement admissible, it is not sufficient for a witness to state that he did not see anything taken down in writing; *per Tindal, C. J., Phillips* v. *Wimburn*, 4 *C. & P.* 273; or that no examination was taken in writing; *Isaac Packer's case, infra;* but the magistrate's clerk, or the magistrate himself, must be called to prove that he did not take down in writing what the prisoner said. Thus where the witness stated that no examination was taken in writing, Parke, J., said, "As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." *Isaac Packer's case, Glouc. Spr. Ass.* 1829; 2 *Russ. on Crimes, by Greaves*, 876. So where a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain, Bosanquet, J., said, that the justice's clerk ought to be called to show whether anything had been taken in writing, as it must be presumed that he had done his duty. *Phillips's case, Worc. Sum. Ass.* 1831; 2 *Russ. on Crimes, by Greaves*, 876.

But where it clearly appears that no examination in writing has been taken, parol evidence of what the prisoner said before the magistrate is admissible. Thus, where the only evidence against a prisoner was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, all the judges (except Mr. Justice Gould) were of opinion that this evidence was well received. *Huet's case*, 2 *Leach*, 821. A written examination before a magistrate will not exclude parol evidence of a *previous* confession made to a third person. *M'Carty's case, M'Nally on Ev.* 45. So remarks or statements made by a prisoner after the commencement of the investigation before the magistrate, and whilst the witnesses are giving their testimony, are receivable in evidence, although the prisoner's examination is afterwards taken in writing. Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it; Parke, J., held, that what the prisoner had said to the witness might be given in evidence. *Johnson's case, Glouc. Spr. Ass.* 1829; 2 *Russ. on Crimes, by Greaves*, 879. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said, "She gave me the glove, but she knew nothing of the robbery;" the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements in the depositions or the examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence. *Hooper's case, Glouc. Sum. Ass.* 1842, *Id.*

It was said by Best, C. J., that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. *Rowland* v. *Ashby*, *Ry.* & *Moo.* 232. So it has been ruled by Parke, J., that an *incidental observation* made by a prisoner *in the course of his examination* before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. *Moore's case*, *Matthew's Dig. Cr. Law*, 157; *Spilsbury's case*, 7 *C.* & *P.* 187, *S.P.*, *per Coleridge*, *J.* But where it ought to have been taken down in writing, and it was not, Littledale, J., ruled that it was inadmissible. *Maloney's case*, *Matthew's Dig. Cr. Law*, 157. However, where on the examination of a prisoner, on a charge of stealing sheep, what was said as to the stealing of certain sheep, the property of one person, was taken down in writing by the magistrate, but not what was said as to other sheep, the property of another person; on a question reserved for the opinion of the judges, whether any confession, as to the latter offence, could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and intended to take down all that was said to him, and believed he did so, parol evidence could be given of anything else that had been addressed to him; the judges present were all of opinion that the evidence was admissible. *Harris's case*, 1 *Moody*, *C. C.* 343. Mr. Phillipps remarks on this case, that it is not an authority for the position that parol evidence is admissible of a statement made by a prisoner, which has not been taken down in his examination, on the ground that the parol testimony there received related to another offence distinct from that mentioned in the examination. 2 *Phill. on Ev.* 64, *9th ed.* See however *Mr. Greaves's* observations, *contrà*, 2 *Russ. on Crimes*, 878. In *Lewis's case*, 6 *C.* & *P.* 162, where *Harris's case* was cited, Gurney, B., said it was very dangerous to admit such evidence, and thought it ought not to be done in the case before him. So where the magistrate's clerk in taking down the examinations of three prisoners, had left a blank whenever any one had mentioned the name of either of the other prisoners, Patteson, J., refused to allow the blanks to be supplied by the parol evidence of the clerk, observing that the rule ought not to be extended. *Morse's case*, 8 *C.* & *P.* 605.

The prisoner is not to be precluded from showing, if he can, that omissions have been made to his prejudice, for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions. Even the prisoner's signature ought not to stop him from proving, if he can, such omissions. 2 *Phill. Ev.* 85, *9th ed.*

Where a written examination before a coroner was inadmissible, on account of some irregularity in taking it, the nature of which does not appear in the report, Tindal, C. J., permitted the coroner to give parol evidence of what the prisoner had said at the time of his examination. *Reed's case*, *Moo.* & *Mal.* 403. See *post*, p. 64. But where the prisoner's statement was erroneously entered by the magistrate's clerk in the information book, and headed, "The information and complaint of R. B.," and the clerk was present at the trial, and could have explained the mistake, Gurney, B., rejected the statement. *Bentley's case*, 6 *C.* & *P.* 148. So where in the

depositions returned by the magistrate, the prisoner was stated to have said, "I decline to say anything," Lord Abinger, C. B., refused to hear parol evidence of a confession before the magistrate. *Walter's case*, 7 *C. & P.* 267. Where, however, on the first of two investigations before the magistrate, the prisoner made a statement which the clerk took down in writing, but it was not read over to the prisoner, neither was he asked to sign it; and the magistrate returned the depositions of the witnesses on the second occasion without the prisoner's previous statement, but on the contrary with a memorandum that "The prisoner being advised by his attorney, declines to say anything," Littledale, J., and Parke, B., were both of opinion that the statement was admissible in evidence, although the magistrate might have neglected his duty in not returning what the prisoner said. *Wilkinson's case*, 8 *C. & P.* 662.

Mode of taking examinations—signature.] The examination of a prisoner, when reduced into writing, ought to be read over to him, and tendered to him for his signature. Where the examination of a prisoner was taken in writing, and afterwards read over to him, upon which he observed, "It is all true enough," but upon the clerk's requesting him to sign it, he said, "No, I would rather decline that," nor was it signed, either by him or by the magistrate; a majority of the judges were of opinion, that the written examination was rightly received in evidence. *Lambe's case*, 2 *Leach*, 552. So where the solicitor for the prosecution, at the request of the magistrate, made minutes of what the prisoner said before the magistrate, and those minutes were read over to the prisoner, who said, "It is all true," but afterwards, on the minutes being again read, objected to some parts of them, and refused to sign them, it was held that they might be read in evidence against the prisoner. *Thomas's case*, 2 *Leach*, 637. But where the examination of a prisoner, confessing his guilt, was put into writing, and he was desired to sign it, which he refused to do, although he admitted his guilt, Wilson, J., refused to receive it, saying, that it was competent to a prisoner, under such circumstances, to retract what he had said, and to say that it was false. *Bennet's case*, 2 *Leach*, 553 (*n*). And where an examination was offered in evidence, and the clerk of the magistrate stated that he took it down from the mouth of the prisoner, and that it was afterwards read over to him, and he was told that he might sign it or not as he pleased, upon which he refused to sign it; Wood, B., was of opinion that the document could not be read. "In *Lambe's case*, the prisoner, when the examination was read over to him, said that it was true, and here, if the prisoner had said so, the case might have been different." *Telicote's case*, 2 *Stark. N. P.* 484; and see *Jones's case*, 2 *Russ.* 658, *post*, p. 64. A statement made before a magistrate having been taken down in writing, and read over to a prisoner, he was asked to sign it. He inquired whether he was bound to sign it or not, and being told that he was not, he said he had rather not sign it. Littledale, J., was clearly of opinion, both upon the cases and on principle, that the examination was not admissible. *John Sykes's case, Shrewsbury Spr. Ass.*, 1830; 2 *Russ. on Crimes, by Greaves*, 882. So where the examination of a prisoner having been taken down in writing before a magistrate, he was neither asked to sign it, nor was it read over to him, Littledale, J., refused to allow the examination to be read in evidence. *Samuel Wilson's case, Shrewsbury Spr. Ass.* 1830, *Id.* Where a prisoner

refuses to sign his examination, or to admit its correctness, the prosecutor may prove his statement by a witness who heard it, "for this proof is independent of the written paper, and it is not proposed as *secondary* evidence, but as competent *primary* proof—which would have been admissible if there had been no written examination, and is not the less admissible because the examination has not been signed either by the magistrate, or by himself (the prisoner);" 2 *Phill. on Ev.* 81, *9th ed.* If the magistrate's clerk is called, he will be allowed to refresh his memory from the examination. Thus, the prisoner having refused to sign his examination before the magistrate, or to admit its truth, Bayley, J., allowed parol evidence to be given of the prisoner's statement, and permitted the magistrate's clerk to read over the examination to refresh his memory. *Dewhurst's case*, 1 *Lewin, C. C.* 47. So where the prisoner made a statement, which was taken down in writing by the magistrate's clerk, but was not signed by the prisoner, Patteson, J., thought it the more safe course that the examination should not be read, but that the clerk should use it to refresh his memory. *Pressley's case*, 6 *C. P.* 183. The above cases were decided before the late statute, which, however, does not alter the previous law in this respect. *Bond's case*, 1 *Den. C. C. R.* 517, *S. C.* 19 *L. J. M. C.* 138.

If the examination is taken down in writing by a constable only, and is not therefore, under the statute, yet if the prisoner signs it, the paper itself may be read in evidence like any other admission. *Swatkins' case*, 4 *C. & P.* 550.

Examinations informal—used to refresh the memory of witness.] It has already appeared that if the examination of a prisoner has been taken down in writing, but not in such a manner as that the writing itself is admissible under the statute, parol evidence of what the prisoner said is admissible; and in such case the writing may be referred to by the witness who took down the examination, in order to refresh his memory. Where a person had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him; it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of his examination. *Layer's case*, 16 *How. St. Tr.* 215. So where an examination taken at several times, was reduced into writing by the magistrate, and on its being completed, was read over to the prisoner, but he declined to sign it, acknowledging at the same time that it contained what he had stated, although he afterwards said that there were many inaccuracies in it; it was held that this might be admitted as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement. *Jones's case*, 2 *Russ.* 658 (*n*). So in *Telicote's case*, *ante*, *p.* 63, supposing the written document was inadmissible, yet the clerk of the magistrate, who was called as a witness, might have proved what he heard the prisoner say on his examination, and have refreshed his memory by means of the examination, which he had written down at the time. 2 *Russ.* 658; see 4 *C. & P.* 550 (*n*). And see *Dewhurst's case*, and *Watson's case*, 2 *C. & K.* 111. So where, on a charge of felony, the examination of the prisoner was reduced into writing by the magistrate's clerk, but nothing appeared on the face of the

paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it, were then acting as magistrates; Patteson, J., permitted the clerk to the magistrates to be called, and to refresh his memory from this paper. *Tarrant's case*, 6 *C. & P.* 182; and see *Pressley's case*, *Id.* 183, *ante*, *p.* 64, and *Bell's case*, 5 *C. & P.* 162.

Mode of proof.] If the examination has been taken in conformity with the provision of the statute, it proves itself, *ante*, p. 59. But should there be alterations or erasures, the clerk to the magistrates, or some person who was present at the time, should be called to explain them. Where upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner, by evidence of the handwriting of the latter, and by calling a person who was present at the examination, it appearing that there were certain interlineations in the examination, Lord Lyndhurst said, that he thought the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. *Brogan's case*, *Lanc. Sum. Ass.* 1834, MS.

The statement is evidence only against the prisoner who makes it. If two prisoners be taken before the magistrate on a charge, a statement made by the first prisoner cannot be given in evidence against a second prisoner, because, when before the magistrate the second prisoner is only called upon to answer, if he pleases, the depositions which have been given on oath against him, and not what the other prisoner may have said on his examination. *Swinnerton's case*, *C. & M.* 593, *per Patteson*, *J.*

DEPOSITIONS.

Statute 11 & 12 *Vict. c.* 42.] THE clauses of the 11 & 12 Vict. c. 42, relating to taking the depositions of witnesses in criminal cases, by which the former statutes of 7 Geo. 4, c. 64, 1 & 2 Ph. & M. c. 13, 14, and 2 & 3 Ph. & M. c. 10, are repealed, have already been given, *ante, p.* 58.

When admissible in evidence.] Before the passing of the 11 & 12 Vict. c. 42, it was clear law that should a witness be proved at the trial either to be dead; 1 *Hale, P. C.* 305; *B. N. P.* 242; (and this though the deceased was an accomplice, *Westbeer's case*, 1 *Leach*, 12;) or to be insane; *Rex* v. *Eriswell*, 3 *T. R.* 710; *R.* v. *Edmunds*, 6 *C. & P.* 164; or to be unable to travel; 1 *Hale, P. C.* 305; or to be bedridden, without any probability of the party again being able to leave the house; *Hogg's case*, 6 *C. & P.* 176, *post;* or of ever being able to bear a journey to the assizes; *Wilshaw's case*, 1 *Carr. & M.* 145; his deposition taken before the magistrate, was admissible in evidence. So also, if the witness was kept away by the practices of the prisoner, 4 *St. Tr.* 492; *Lord Morley's case, Kel.* 55; *Gutteridge's case*, 9 *C. & P.* 471; but when the indictment is against several prisoners, the deposition of the absent witness is admissible against that prisoner only who has kept the witness away; *Scaife's case*, 2 *Den. C. C. R.* 281, *S. C.* 21 *L. J. M. C.* 221.

But it was very doubtful whether the mere, casual, and temporary inability of the witness to attend in a criminal case, was a sufficient ground for admitting his deposition. 2 *Stark. Ev.* 266, *2nd ed.*, 383, *3rd ed.* Thus Patteson, J., held, that where a witness was so near her confinement as to be unable to attend the assizes, her deposition was inadmissible. *Ann Savage's case*, 5 *C. & P.* 143. So where a witness had been suffering from delirium and depression

of spirits, in consequence of a blow on the head, and his intellect was affected by the injury he had received, but his physician was of opinion that he would recover, Ludlow, Serjeant (after consulting Coltman, J.,) ruled that the deposition could not be received in evidence; but that the proper course was to move to postpone the trial, on an affidavit of the illness of the witness. *Marshall's case*, 1 *C. & M.* 147; *Wilshaw's case*, 1 *C. & M.* 145.

It is now expressly enacted by the 11 & 12 Vict. c. 42, s. 17, that "if upon the trial of the person accused, it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the justice purporting to sign the same."

To render therefore a deposition admissible under this statute, it must, in the first place, be *proved* that the witness is dead, or so ill as to be unable to travel. A witness must be called to prove either of these facts of his own knowledge. In practice, it often happens that the surgeon who has been attending the witness sends a certificate of the state of the health of his patient; now this is no legal evidence whatever of the fact. In *Riley's case*, 3 *C. & K.* 316, Patteson, J., laid it down, that where a witness is ill, his deposition would not be received in evidence under this statute, unless the surgeon attended at the trial to prove that the witness was unable to travel; and that where a witness was permanently disabled and was not attended by a surgeon, other evidence that the witness was unable to travel was receivable. In that case, it appears that the witness was attended by a surgeon, who was not called; but another person proved that he saw the witness in bed on the 18th March, when he seemed ill; the commission-day was the 21st, and the trial took place on the 23rd; it was held that the proof was insufficient to render the deposition admissible. Where a witness came to the assizes but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, Parke, B., held that the witness was "unable to travel" within the meaning of this section, and allowed his depositions to be read. *Wicker's case*, 18 *Jur*. 252.

If the proof be satisfactory in this respect, the deposition of the witness is admissible in evidence before the grand jury, as well as before the petty jury. *Clements's case*, 2 *Den. C. C. R.* 251; *S. C.* 20 *L. J. M. C.* 193. It may be read in evidence, although the deposition was not taken on the same technical charge as that for which the prisoner is indicted, if it be in fact the same case, and the prisoner had full opportunity for cross-examination; *Beeston's case*, *Dears. C. C. R.* 405; *S. C.* 24 *Law J. M. C.* 5. There the prisoner had been charged before a magistrate with feloniously wounding A. with intent to do him grievous bodily harm, and the deposition of A. was taken under the statute. A. having subsequently died of his wounds, the prisoner was indicted for the murder. A's deposition was held to be admissible in evidence on the trial. And in that case, the previous decision in *Ledbetter's case*, 3 *C. & K.* 108, was explained by

Alderson, B., that there "it might very well have been that a full opportunity of cross-examination was not afforded." A deposition cannot be read against the prisoner on his trial, merely because the witness is absent and resident in a foreign country. *Austen's case*, 25 *L. J. M. C.* 48.

Mode of taking depositions.] To render a deposition of any kind evidence against a party, it must appear to have been taken on oath, in a judicial proceeding, and that the party should have an opportunity to cross-examine the witness. *Per Hullock, B., Attorney-General* v. *Davison, M'Clel. & Y.* 169. Thus, where a woman had been mortally wounded, and a magistrate, at the request of the overseer of the parish, attended at the hospital where she lay, and in the absence of the prisoner, took her examination upon oath, which he committed to writing and signed, and which was signed by the woman also, who afterwards died; it was held that this examination was a voluntary and extra-judicial act on the part of the magistrate, the prisoner not being before him, and having no opportunity of contradicting the facts it contained; but still that it was admissible as the declaration of the deceased, signed by herself, and was to be classed with the other confirmatory declarations which she made after she had received the mortal wounds, and before she died. *Woodcock's case*, 1 *Leach*, 500. In several other cases also, depositions taken in the absence of the prisoner have been rejected. *Dingler's case*, 2 *Leach*, 561. *Callaghan's case*, 33 *Geo.* 3; *M'Nally on Ev.* 385. *Errington's case*, 2 *Lewin, C. C.* 142.

The title or caption of the deposition need state no more than that it is the deposition of the witness, and that the examination had reference to the particular charge upon which the prisoner is being tried. Where, therefore, upon the trial of a prisoner for unlawfully obtaining a promissory note by false pretences, the deposition of the prosecutrix, proved to have been regularly taken before the committing magistrate, stated, by way of caption, that it had been taken "in the presence and hearing of Harriet Langridge (the prisoner), late of &c., wife of John Langridge, of the same place, labourer, who is now charged before me this day for obtaining money and other valuable security for money from M. R. (the prosecutrix), then and there being the money of &c.;" it was held, that such caption charged an offence against the prisoner with sufficient distinctness, and that the deposition had been properly received in evidence at the trial, after due proof of the absence of the prosecutrix from illness. *Langridge's case*, 1 *Den. C. C. R.* 448, *S. C.* 18 *L. J. M. C.* 198. One caption at the head of the body of the depositions taken in the case is sufficient, and the particular deposition sought to be given in evidence need not have a separate caption. *Johnson's case*, 2 *C. & K.* 355. So where the depositions had one caption, which mentioned the names of all the witnesses, and at the end had one jurat, which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition, Williams, J., was of opinion that they were correctly taken. *Young's case*, 3 *C. & K.* 106.

Where the prisoner was not present during the examination, until a certain part of the deposition marked with a cross, at which period he was introduced, and heard the remaining part of the examination, and when it was concluded, the whole was read over to him; Chambre, J., refused to admit that part of the depositions previous

to the mark, which had not been heard by the prisoner. *Forbes's case*, *Holt*, 599 (*n*). But a different rule was acted upon in the following case. The prisoner was indicted for murder, and the deposition of the deceased was offered in evidence. It appeared that a charge of assault having been preferred against the prisoner, the deposition of the deceased had been taken *on that charge*. The prisoner was not present when the examination commenced, but was brought into the room before the three last lines were taken down. The oath was again administered to the deceased in the prisoner's presence, and the whole of what had been written down was read over to him. The deceased was then asked in the presence of the prisoner, whether what had been written was true, and he said it was perfectly correct. The magistrates then, in the presence of the prisoner, proceeded to examine the deceased further, and the three last lines were added to the deposition. The prisoner was asked whether he chose to put any questions to the deceased, but did not do so. It was objected, first, that the prisoner had not been present, and secondly, that the deposition was inadmissible, because the examination ought to be confined to the offence with which the prisoner is charged at the time, which was an assault, and could not apply to the present charge of murder. The deposition, however, was admitted, and by a majority of the judges held rightly admitted. *Smith's case*, *Russ. & Ry.* 339; 2 *Stark. N. P.* 208, *S. C.* In *Beeston's case*, *ante*, *p.* 67, Alderson, B., stated that he still thought he was right in the objection which, as counsel for the prisoner, he took to the admissibility of the deposition in *Smith's case*, upon the ground that "the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers and seeing his manner of answering, and that so much of the evidence as had been taken in the prisoner's absence was inadmissible." See also the observations of Platt, B., in *Johnson's case*, 2 *C. & K.* 394.

A deposition on oath taken by a justice's clerk, the justice not being present, nor at any time seeing, examining, or hearing the deponent, is irregular, and no justification of proceedings founded upon it. *Caudle* v. *Seymour*, 1 *Q. B.* 889.

Mode of taking depositions—should be fully taken.] By the 11 & 12 Vict. c. 42, it is expressly enacted that the justice "shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same." The observations of Parke, B., in *Thomas's case*, 7 *C. & P.* 718, are still pertinent. He said, "Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto in many cases confined themselves to what they deemed material, but in future it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the prisoners' counsel bill has shown us how much time is occupied in endeavouring to establish contradictions between the testimony of the witnesses and their depositions, in the omission

of minute circumstances in their statements made before the magistrates, as well as in other particulars." Where there was an omission, in the depositions, of a conversation which was sworn to at the trial, and which the witness said he had told to the magistrate, Lord Denman, C. J., thought the complaint of the prisoner's counsel, that such omission was unfair to the prisoner, was well founded, and that the magistrate ought to have returned all that took place before him with respect to the charge, as the object of the legislature in granting prisoners the use of the depositions was, to enable them to know what they have to answer on their trial. *Grady's case*, 7 *C. & P.* 650. The same learned judge expressed an opinion that although in a case of felony, the committing magistrate need not bind over all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge, it was very desirable that all which had been given in evidence before the magistrate should be transmitted to the judge. *Smith's case*, 2 *C. & K.* 207. So also that in cases where the prisoner calls witnesses before the magistrate in answer to the charge, they should be heard, and their evidence taken down; and that if the prisoner be committed for trial, the depositions of his witnesses should be transmitted to the judge, together with the depositions in support of the charge. *Anon.* 2 *C. & K.* 845. If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate and returned to the judge. *Potter's case*, 7 *C. & P.* 650. In *Coveney's case*, 7 *C. & P.* 668, Alderson, B., stated, there is a difference between adding to a deposition and contradicting it, and he apprehended the object of the then recent act was to see that witnesses did not swear a thing before the magistrate and contradict it at the trial. In *Weller's case*, 2 *C. & K.* 223, Platt, B., held that where in the course of a witness's examination the prisoner interposes an observation material to the case, such observation should be taken down in the depositions; and that if it has not been so taken down, evidence of it ought not to be given of it at the trial. But should the prisoner interpose a statement, he ought to be told by the magistrate that that is not the proper time for him to make it. *Per Patteson, J., Watson's case*, 2 *C. & K.* 111.

Wilde, C. J., was of opinion that where a person of weak intellect was examined, the magistrate's clerk should take down in the depositions the questions put by the magistrate and the answers given by the witness as to the witness's capacity to take an oath. *Painter's case*, 2 *C. & K.* 319.

Mode of taking depositions—signature.] Where, before the passing of the 11 & 12 Vict. c. 42, a prisoner was charged with forging the acceptance to a bill of exchange of one Winter, who had died previous to the trial, the magistrates' clerk proved Winter's examination to have been duly taken in the prisoner's presence, and that he was cross-examined by his attorney. On the prosecutor tendering the examination in evidence, it was discovered, that although the examination itself was duly signed by the magistrates, the cross-examination, which had been taken on a subsequent day, was not subscribed by them. The examinations however of two witnesses, called by the prisoner, and taken at the same time, were pinned up along with the cross-examination, and the last sheet of the whole was signed by the magistrates. Alderson, B.,

(after consulting Parke, B.,) said, that if the clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he could not reject the examination of Winter in evidence, but must receive the whole in evidence. The clerk having no recollection of the subject, one of the magistrates, who happened to be in court, was called. He said that when he signed the depositions they were lying on the table, but he could not state they were pinned together. Alderson, B., thereupon rejected both the examination and cross-examination. *France's case*, 2 *Moo. & R.* 207. "It is the magistrate's duty to take care that the deposition of every witness is signed at the time when it is taken." *Per Lord Denman, C. J., Reg.* v. *The Lord Mayor of London;* 1 *Car. H. & A. p.* 46. And now by the express words of the 17th sect. of the above statute it is enacted that "such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same."

Mode of taking depositions—parol evidence not admissible to vary depositions.] The above statute requiring that the depositions of the witnesses examined before a magistrate shall be taken in writing, the presumption is that the magistrate has done his duty, and reduced them into writing. *Fearshire's case*, 1 *Leach*, 202. Parol evidence, therefore, is inadmissible to vary them. *Thornton's case*, 1 *Phill. Ev.* 566, 8*th ed.* In the case of the *examination* of a prisoner, it has been decided, that where the magistrate did not hear, and consequently did not reduce into writing, a portion of the prisoner's confession, parol evidence of such portion is admissible. *Harris's case*, 1 *Moo. C. C.* 338, *ante, p.* 62; but in the case of a *deposition*, parol evidence would, it is conceived, under similar circumstances, be inadmissible. It is unlike the case of a prisoner's examination, which, if it loses its judicial character, is nevertheless the subject of oral testimony. A deposition, on the other hand, if not admissible as a judicial proceeding, seems to possess no other character in which it can be received. *Phill. Ev.* 566, 8*th ed.;* and see 9*th ed.*, *p.* 72; also 2 *Russ. by Grea.* 895 (*n*). Material evidence may, however, be given on his trial, in addition to what appears from the depositions to have been given against the prisoner before the magistrates. *Ward's case*, 2 *C. & K.* 759.

Depositions admissible on trial of other offence than that with which the prisoner was charged.] The deposition of a witness since deceased, regularly taken under the statute, is admissible on the trial of an offence different from that with which the prisoner was charged at the time of the examination taken; as in *Smith's case, Russ. & Ry.* 339, *ante, p.* 69, and *Beeston's case*, 1 *Dears. C. C. R.* 405, *ante*, p. 67, where the deposition was taken on a charge of assault, and given in evidence on a trial for murder. Nor is it necessary that the offence should be complete at the time of the deposition; thus where the examination of a party wounded is taken, if he afterwards die of his wounds, that deposition is admissible, on a trial for the murder. *Id. Radbourne's case*, 1 *Leach*, 458; 1 *East, P. C.* 356, *S. C.*

Depositions admissible on the part of the prisoner to contradict the witness.] One of the objects of the legislature in requiring the magistrate to take the depositions of witnesses is, that the court

before which the prisoner is tried, may see whether those witnesses are consistent or contradictory in the evidence they give. *Vide Lambe's case*, 2 *Leach*, 558. The depositions therefore may be used on the part of the prisoner to contradict the evidence of the witnesses given at the trial. *Strafford's case*, 3 *St. Tr.* 131, *fo. ed.*; *Hawk. P. C. b.* 2, *c.* 46, *s.* 22.

Depositions whether admissible on the part of the prosecution to contradict the witness.] Where the name of the prisoner's mother was on the indictment, and the counsel for the prosecution declined to call her, upon which the judge ordered her to be examined, and finding her evidence differing from that she had given before the magistrate, directed the deposition to be read, the judges held this to be correct; and Lord Ellenborough and Mansfield, C. J., thought the prosecutor had a right to call for the depositions. *Oldroyd's case*, *Russ. & Ry.* 88. So where a witness for the prosecution on being examined gave a different account of the transaction from what he had deposed to before the committing magistrate, and the counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to on the part of the prisoner; Bayley, J., after consulting Holroyd, J., admitted the proposed contradiction. *Boyle's case, cited in Wright* v. *Beckett*, 1 *Moo. & R.* 422, by Lord Denman, C. J., who added, "I am bound to add that that eminent judge has no remembrance of this decision, and find on debating the matter with him, that his present opinion is against it. But I cannot help thinking that *Rex* v. *Oldroyd* appeared to him, when cited, as it does to me, a conclusive authority for the principle now under controversy." Where a witness on the trial gave a different account of the transaction from that which she gave before the magistrate, Coleridge, J., on the application of the counsel for the prosecution, allowed the two depositions made by the witness before the magistrate to be identified as such, and then read to the witness, and she was examined upon them by the learned judge. *Hallett's case*, 9 *C. & P.* 748.

But where a witness, who had been examined before a magistrate, gave a statement in court more favourable to the prisoners than that which he had made before the magistrate, and it was proposed on the part of the prosecution to put in his deposition, and *Oldroyd's case* was relied upon; it was objected that the opinion there expressed was extra-judicial, and that the counsel for the prosecution had no right to call a witness, and, in case he gave evidence against the prosecution, to discredit him. Bolland, B., said, "I do not think the case cited is an express authority. I agree that I can only look at the deposition as destroying the credit of the witness, and therefore I shall not allow the deposition to be read." *Tunnicliffe's case*, *Staff. Spr. Ass.* 1830, 2 *Russ.*, *by Greaves*, 897. So where a witness called for the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house, as stated by the prosecutor, and in order to do away with the effect of the evidence of the witness, which, if believed, disproved the whole case for the prosecution, it was proposed on the part of the prosecution, to show that the statements made by the witness before the magistrate were wholly inconsistent with the account given at the trial. Erskine, J., after consulting Patteson, J., rejected the evidence, saying, "You cannot put in evidence, for the purpose of discrediting your own witness. You may call other witnesses to prove the facts denied by this witness, and incidentally contradict her and show her to be unworthy of credit; but

you cannot call a witness, or give evidence, not otherwise admissible, for the purpose of discrediting your own witness." *Ball's case*, 8 *C. & P.* 745.

So where an accomplice, who could not read, gave evidence at the trial, falling far short of what he stated before the magistrate, Gurney, B., refused to allow his deposition, which had been put into his hand, to be read to him by the officer of the court, at the instance of the prosecutor, with a view of examining upon it. *Beardmore's case*, 8 *C. & P.* 260.

Where there are several depositions.] Where several depositions had been taken before the magistrate, but one only was produced at the trial, Hullock, B., refused to receive it, though it was the only one which was taken in writing. Those not produced, he said, might be in favour of the prisoner, and it would be unreasonable to allow the prosecutor to choose which he would produce. *Pearson's case*, 1 *Lewin, C. C.* 97; but the correctness of this decision has been doubted, as the only deposition taken agreeably to the statute had been returned. *Phill. Ev.* 567, 8*th ed.*

Of returning depositions.] Nothing should be returned as a deposition against the prisoner, unless the prisoner had an opportunity of cross-examining the person making the deposition. *Per Lord Denman, C. J., Arnold's case*, 8 *C. & P.* 621. But where a witness has undergone several examinations, it seems proper to return them all, although those only would be admissible in evidence against the prisoner which were taken in his presence. Thus where a witness for the prosecution had made three statements at three different examinations, all of which were taken down by the magistrate, but the only deposition returned was the last taken after the prisoner was apprehended, and on the day he was committed; Alderson, B., said, that every one of the depositions ought to have been returned, as it is of the last importance that the judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the judge all the depositions that have been made at *all the examinations* that have taken place respecting the offence which is to be the subject of a trial. *Simon's case*, 6 *C. & P.* 540; and whether for the prosecution or on the part of the prisoner. *Per Vaughan, J., Fuller's case*, 7 *C. & P.* 269; see also *Smith's case*, 2 *C. & K.* 207; *Anon.* 2 *C. & K.* 854, *ante*, p. 70.

[Pri]soners entitled to copies of the depositions.] By the prisoners' counsel act, 6 & 7 Wm. 4, c. 114, s. 3, "all persons who, after the passing of this act, shall be held to bail or committed to prison, for any offence against the law, shall be entitled to require, and have, on demand, from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same, copies of the examinations of the witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words; provided always, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial of the person on whose

behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy or examination of witnesses not having been previously had by the party charged."

By s. 4, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

It has been held by Littledale, J., and Parke, B., that a prisoner is not entitled, under the above statute, to a copy of his own statement returned by the committing magistrate along with the depositions of the witnesses. *Aylett's case*, 8 *C. & P.* 669. This decision is in conformity with the strict letter of the act, but it may be doubted whether it accords with the intention of the legislature. Where the case for the prosecution, as on the trial of Greenacre for murder, depends chiefly on contradictions of the prisoner's statement before the magistrate, it seems only reasonable that his counsel should be furnished with a copy of such statement. In the reporter's note to the above case it is suggested that at all events, according to the principles laid down by Littledale and Coleridge, JJ., in *Greenacre's case*, 8 *C. & P.* 32, and *post*, p. 76, the judges being in possession of the depositions may direct their officer, if they think it will conduce to the ends of justice, to furnish a copy of the statement on application by the prisoner or his counsel.

The statute does not apply to the case of prisoners committed for re-examination, but only to those who have been fully committed for trial. *Reg.* v. *The Lord Mayor of London*, 5 *Q. B.* 555; *S. C.* 13, *L. J. M. C.* 67. Where therefore a prisoner had been committed to gaol until he should give sufficient sureties for keeping the peace and for appearing at the sessions to do as the court should order, it was held, on a rule for mandamus to justices to furnish copies of the depositions taken against him, that he was not entitled to them. *Ex parte Humphreys*, 17 *L. J. M. C.* 189. For the rules of practice laid down with respect to cross-examining witnesses as to their depositions, see *tit. Practice*; and *ante*, p. 64.

Depositions before the coroner.] It is enacted by the 7 Geo. 4, c. 64, s. 4, E., which repeals (as before stated) the 1 & 2 Ph. & M. c. 13, and by the 9 Geo. 4, c. 54, I., "that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessary to murder before the fact, shall put *in writing the evidence given to the jury* before him, or as much thereof *as shall be material*, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessary to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and

shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court."

Depositions taken before the coroner are admissible in the same manner as depositions taken before a magistrate, where the witness is dead or kept out of the way by the means or contrivance of the prisoner, or where he is unable to travel, or cannot be found. *Gilb. Ev.* 138; *Hawk. P. C. b.* 2, *c.* 46, *s.* 15; 2 *Russ.* 661. In one respect, however, an important distinction has been taken between depositions before a magistrate and those taken before the coroner; the latter, as it is alleged, being admissible, although the prisoner was not present when they were taken. This is stated in a book of reputation, *B. N. P.* 242, on the authority of two cases, *Bromwich's case*, 1 *Lev.* 180. *Thatcher* v. *Waller*, *T. Jones*, 53; see also 6 *How. St. Tr.* 776; 12 *Id.* 851, 13 *Id.* 591; but it is observed by Mr. Starkie, 2 *Evid.* 278, 2*nd ed.*, that in neither of these cases was the question considered upon plain and broad principles. It was also said by Mr. Justice Buller, in *R.* v. *Eriswell*, 3 *T. R.* 707, that depositions taken before the coroner, in the absence of the prisoner, are admissible. It has been observed, however, that his lordship did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to *Radbourne's case*, 1 *Leach*, 512, as an authority, in which case the depositions were in fact taken *in the presence* of the prisoner. Lord Kenyon also in the same case, although he coincided in opinion with Buller, J., appears to have considered that depositions before a magistrate and before a coroner were on the same footing. 2 *Stark. Ev.* 278, 2*nd ed.* The reasons given in support of the distinction are, that the coroner's inquest is a transaction of notoriety, to which every one has access, 2 *T. R.* 722; and that as the coroner is an officer appointed on behalf of the public, to make inquiry into matters within his jurisdiction, the law will presume the depositions before him to have been duly and impartially taken. *B. N. P.* 242. Hotham, B., is stated to have received depositions taken before the coroner, though it was objected that the defendant had not been present. *Purefoy's case*, *Peake, Ev.* 68, 4*th ed.* Mr. Phillipps observes, that the authorities appear to be in favour of such evidence being admitted, but that they are not very satisfactory. *Phill. Ev.* 570, 8*th ed.* And a writer of high reputation has stated, that the distinction between these depositions, and those taken before a magistrate, is not warranted by the legislature, and that as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration, whether it ought to be supported. 2 *Stark. Ev.* 278, 2*nd ed.* This opinion has been adopted by another text-writer of eminence. 2 *Russ.* 661. Mr. Phillipps also remarks, that as far as the judicial nature of the inquiry is important, it appears to be as regular for the coroner to take the depositions in the absence of the prisoner, as it is for a justice to take the evidence in his presence. But although an inquiry by the coroner in the absence of the prisoner be a judicial proceeding, and required by the duty of his office, yet there seems no satisfactory reason why it should not be confined to its proper objects, or why the depositions should not be received under circumstances which render every other kind of depositions taken judicially inadmissible, except by express statutory provision. *Phill. Ev.* 570, 8*th ed.* And he adds (2*nd vol.* p. 75, 9*th ed.*), "and it seems an unreasonable and anomalous proposition to hold that on a trial for murder upon the coroner's inquest, a deposition taken before him, in

the absence of the prisoner, is receivable in evidence; but that if the trial takes place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other. See *Charles Wall's case*, 2 *Russ. by Greaves*, 893, and *Taylor on Evidence*, 414, 2*nd ed.*

Although the 7 Geo. 4, c. 64, s. 4, does not require the depositions of witnesses taken before a coroner to be signed, it is desirable that they should not only be so signed, but read over to the witnesses before signature. See *per Gurney, B.*, *George Plummer's case*, 1 *Carr. & K.* 608.

The judges have power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the inquisition took place, although the case is not one in which the coroner could have been compelled to return them under the 7 Geo. 4, c. 64, s. 4. *Greenacre's case*, 8 *C. & P.* 32.

Depositions in India by consent, &c.] By the 13 Geo. 3, c. 63, in cases of indictments or informations in the King's Bench, for misdemeanors or offences committed in India, that court may award a mandamus to the judges of the supreme court, &c., who are to hold a court for the examination of witnesses, and receiving other proofs concerning the matters in such indictment or information; and the examination publicly taken in court shall be reduced to writing, and shall be returned to the court of King's Bench, in the manner directed by the act, and shall be there allowed, and read, and deemed as good evidence, as if the witness had been present. *Sec.* 40. The provisions of this section are extended by 6 & 7 Vict. c. 98, s. 4, to all indictments or informations in the Queen's Bench for misdemeanors or offences committed against the acts passed for the suppression of the slave trade in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory.

Depositions with regard to prosecutions for offences committed abroad by persons employed in the public service, are regulated by statute 42 Geo. 3, c. 85.

Depositions are sometimes taken by consent in prosecutions for misdemeanors. *Morphew's case*, 2 *M. & S.* 602; *Anon.* 2 *Chitty*, 199. But if the trial comes on before the departure of the witness, or after his return, the depositions cannot be read. *Tidd.* 362. 2 *Phill. Ev.* 94, 9*th ed.* See *R.* v. *Douglas*, 13 *Q. B.* 42.

ONUS PROBANDI.

General rule—affirmative to be proved.] It is a general rule of evidence established for the purpose of shortening and facilitating investigations, that the point in issue is to be proved by the party who asserts the affirmative. *Phill. Ev.* 493, *9th ed.*; *B. N. P.* 298. It is however necessary to look to the substance, and not to the form of the issue, for in many cases a party, by making a slight change in the form of his pleading, might make the issue affirmative at his pleasure. *Per Lord Abinger, C. B., Sowor* v. *Leggatt*, 7 *C. & P.* 613. There are some exceptions to the above rule.

Where the presumption of law is in favour of the affirmative.] As the above rule is not founded on any presumption of law in favour of the party, but is merely a rule of practice and convenience, it ceases in all cases where the presumption of law is thrown into the other scale. "Where the law," says Gilbert, C. B., "supposes the matter contained in the issue, there the opposite party must be put into the proof of it by a negative, as in the issue of *ne unques accouple in loyal matrimonio*, the law will suppose the affirmative without proof, because the law will not easily suppose any person to be criminal; and, therefore, in this case the defendant must begin with the negative." *Gilb. Ev.* 145.

In general, therefore, as the law presumes that every person acts legally, and performs all the matters which he is by law required to perform, the party who charges another with the omission to do an act enjoined by law, must prove such omission, although it involves the proof of a negative. Thus in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Exchequer, it was held that the plaintiff was bound to prove the negative, *viz.* that Lord Halifax did not deliver them, for a person shall be presumed duly to have executed his office till the contrary appear. *B. N. P.* 298. So in an action for the recovery of penalties under the hawkers' and pedlars' act (29 Geo. 3, c. 26, s. 4; repealed and re-enacted by 50 Geo. 3, s. 7), against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, *viz.* of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. *Phill. Ev.* 1*st vol.* p. 494, 9*th ed.* So in ejectment for not insuring according to covenant, it lies upon the plaintiff to prove that no insurance has been effected. *Doe* v. *Whitehead*, 8 *A. & E.* 571. See also on this point, *Elkin* v. *Janson*, 13 *M. & W.* 655.

Upon the same principle, on the trial of an indictment under the 42 Geo. 3, c. 107, s. 1, (repealed,) which made it felony to course deer in an enclosed ground, "without the consent of the owner of the deer;" it was held that proof of the consent not having been given

must have been produced on the part of the prosecutor. *Rogers's case*, 2 *Campb.* 654. But in order to prove such want of consent it was not essential to call the owner himself. *Allen's case*, *Chamberlain's case*, 1 *Moo. C. C.* 154. *Hazy's case*, 2 *C. & P.* 458. Upon the same principle, where the issue is on the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting its illegitimacy to prove it. *Banbury Peerage case*, 2 *Selw. N. P.* 709. And where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it. *Ante*, p. 21.

Where a person on whom stolen property is found gives a reasonable account of how he came by it, the prosecutor ought to show on the trial that the account is untrue. *Aliter*, if that account be unreasonable or improbable on the face of it. Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N.; who lived about two miles off, Mr. Baron Alderson held that it was incumbent on the prosecutor to negative this statement. N. was not called by either party. The prisoner was acquitted. *Crowhurst's case*, 1 *Carr. & K.* 370. So in *Smith's case*, 2 *C. & K.* 207, Denman, C. J., held that where a person in whose possession stolen property is found gives a reasonable account of how he came by it, and refers to some known person from whom he received it, the examining magistrate should have that person before him, as his evidence may either entirely exonerate the accused, or may prove that in addition to his possession of the goods the accused has been giving a false account of how he came by them.

Where a fact is peculiarly within the knowledge of a party.] But where a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law, will not render it incumbent upon the other side to prove the negative; but the party who must know the fact is put to the proof of it. Thus, in the case of a conviction under the 5 Ann. c. 14, s. 2, (repealed,) against a carrier having game in his possession, it was held sufficient that the qualifications required by the 22 & 23 Car. 2, c. 25, (repealed,) were negatived in the information and adjudication, without negativing them in evidence. *Turner's case*, 5 *M. & S.* 206. So where, on a conviction for selling ale without a license, the only evidence given was that the party sold ale, and no proof was offered of his selling it without a license, the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment. It was said by Abbott, C. J., that the party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas if the case is taken the other way, the informer is put to a considerable inconvenience. *Harrison's case*, *Paley on Convictions*, 45 (*n.*), *2nd ed.* See also *Smith's case*, 3 *Burr.* 1476. The same rule has been frequently acted upon in civil cases. Thus, on an action against a person for practising as an apothecary, without having obtained a certificate according to the 55 Geo. 3, c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need not give any evidence of his practising without it. *Apoth. Comp.* v. *Bentley*, *R. & M. N. P. C.* 159. As to the presumption of innocence, see *ante*, p. 16.

EVIDENCE CONFINED TO THE ISSUE.

General rule.] It is a general rule, both in civil and criminal cases, that the evidence shall be confined to the point in issue. In criminal proceedings it has been observed (2 *Russ. by Greaves*, 772), that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. Under this rule, therefore, it is not competent for the prosecutor to give evidence of facts, tending to prove another distinct offence, for the purpose of raising an inference that the prisoner has committed the offence in question. Thus, in treason, no overt act amounting to a distinct and independent charge, though falling under the same head of treason, can be given in evidence, unless it be expressly laid in the indictment; yet if it amounts to direct proof of any of the overt acts laid, it may be given in evidence. *Foster*, 245. Upon the same ground it is not competent to the prosecutor to give evidence of the prisoner's tendency to commit the offence with which he is charged. Thus, on a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, was held by all the judges to have been properly rejected. *Cole's case*, 1 *Phill. Ev.* 477, 9*th ed.*

Upon an indictment for stealing a piece of pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered the prosecutor's shop, and ran away with some pork, but in about two minutes he returned, replaced the pork in a bowl which contained the knives, and took away the whole. In about half an hour he returned and took away the loaf. It was held by Littledale, J., that the taking of the loaf could not be given in evidence upon that indictment, that the prisoner's taking the pork and returning in two minutes and taking away the bowl must be considered as one continuing transaction; but that half an hour was too long a period to admit of that construction, and, therefore, that the taking of the loaf was a distinct offence.

Birdeye's case, 4 *C.* & *P.* 386. But on an indictment for burglary and larceny, which failed from it appearing that the prisoners might have been in the house before dark, and that nothing had been stolen at that time; the prosecutor proposed to give evidence of a larceny previously committed in the house by the prisoners on the same day, but the court rejected the evidence, the latter felony being a distinct transaction. *Vandercomb's case*, 2 *Leach*, 708; 2 *East*, *P. C.* 519, *S. C.*

By 14 & 15 Vict. c. 100, ss. 16 & 17, three larcenies from the same person within six months may now be included in the same indictment; and where a single taking is charged, the prosecutor is not required to elect, unless it appear that there were more than three takings, or more than six months between the first and last taking.

Cases where evidence of other transactions is admissible, as referrible to the point in issue.] But where the evidence is referrible to the point in issue, it will not be inadmissible, although it may incidentally apply to another person, or to another thing not included in the transaction in question, and with regard to whom, or to which, it is inadmissible. See *Willis* v. *Bernard*, 8 *Bingh.* 376. On an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the firing, was afterwards discovered in the prisoner's possession. *Rickman's case*, 2 *East*, *P. C.* 1035. A case is cited by Lord Ellenborough, in *Whiley's case*, where a man committed three burglaries on one night, and stole a shirt at one place and left it at another, and they were all so connected that the court heard the history of the three burglaries. *Whiley's case*, 2 *Leach*, 985; 1 *New Rep.* 92, *S. C.* Mr. Justice Heath, at the same trial, cited a case where several persons were indicted for a conspiracy to raise wages, and on the trial evidence was received of circumstances which, taken by themselves, amounted to substantive felonies; but as those circumstances were material to the point in issue, they were admitted in evidence. *Id.* The prisoner was indicted for robbing the prosecutor (by threatening to accuse him of an unnatural offence). For the prosecution, evidence was given of a similar attempt on the following evening, when the prisoner brought with him a duplicate pawn ticket for a coat, which he had obtained before. This evidence was objected to, as going to establish a distinct offence; but Holroyd, J., received it (Wood, B., coinciding with him as to its admissibility) on the ground of its being offered as confirmatory of the truth of the prosecutor's evidence, as to the transactions of the former day, and as to the nature of those transactions. *Egerton's case*, *Russ. & Ry. C. C.* 376. Upon the same principle, *viz.* that the other acts were explanatory of the transaction in question, similar evidence was admitted in the following case:—The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings. The son of the prosecutrix suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was watched by him. On the first examination of the till it contained 11*s.* 6*d.* The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when it was objected that this would be to prove several

felonies. The objection being overruled, the prosecutrix's son proved, that upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction. *Ellis's case*, 6 *B. & C.* 145. Similar evidence was since admitted in a case of robbery. The prisoners came with a mob to the prosecutor's house, and one of the mob went up to the prosecutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bonâ fide* advice to the prosecutor, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. Parke, J., having conferred with Vaughan, B., and Alderson, B., said, "We are of opinion, that what was done by the mob, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence." He afterwards stated that the judges (it was a special commission) had communicated with Lord Tenterden, who concurred with them in this opinion. *Winkworth's case*, 4 *C. & P.* 444. See also *Mogg's case*, 4 *C. & P.* 364.

It was formerly considered that, where there were separate indictments for offences constituting part of the same transaction, evidence of an offence which formed the subject-matter of one indictment, was not admissible upon the trial of another. *Smith's case*, 2 *C. & P.* 633. But it has been subsequently held that there being another indictment pending makes no difference. Thus, where, upon an indictment for felony, a matter which was the subject of another indictment for felony was essential to the chain of facts necessary to make out the case, both felonies being parts of one transaction, Patteson, J., held that the subject-matter of the other indictment might be given in evidence without abandoning such other indictment. *Salisbury's case*, 5 *C. & P.* 155. So upon an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment. *Per Gaselee, J., and Park, J., Fursey's case*, 6 *C. & P.* 81. So where there were three several indictments against the prisoner for burning three ricks which had been set on fire one immediately after the other, and the prisoner was tried on the third indictment; Gurney, B., allowed an accomplice to give evidence of the setting fire to all the three ricks, as constituting part of the same transaction. *Long's case*, 6 *C. & P.* 179. *Freeman's case, post, tit. Practice, S. P. Folke's case*, and *Lea's case, post, tit. Rape.* And see also *Stonyer's case*, 2 *Russ. by Greaves*, 775. So where upon an indictment for robbing A., there being another indictment against them for robbing B. of a watch, it appeared that A. and B. were travelling in a gig, when they were stopped and robbed. Littledale, J., held that evidence might be given that B. lost his watch at the same time and place that A. was robbed, but that evidence was not admissible of the violence that was offered to B. One question in the case was whether the prisoners were at the place in question when A. was robbed, and as proof that they were, evidence was admissible that one of them had got something which was lost there at the

time. *Rooney's case*, 7 *C. & P.* 517. Where upon an indictment for robbing G. and H., it appeared that the prisoners attacked and robbed G. and H. when they were walking together, Tindal, C. J., held that the prosecutor was not bound to elect as to the robbery with which he would proceed, it was all one act and one entire transaction, the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case. *Giddin's case*, 1 *Carr. & M.* 634.

Cases where evidence of other transactions is admissible, as referrible to the point in issue—acts and declarations of conspirators.] Not only, as in the cases before mentioned, may the acts and declarations of the prisoner himself on former occasions, be admitted, when referrible to the point in issue, but also the acts and declarations of other persons with whom he has conspired, may, if referrible to the issue, be given in evidence against him.

In prosecutions for conspiracies, it is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law as well as in sound reason, the act of the whole party: and, therefore, the proof of the act will be evidence against any of the others who were engaged in the same general conspiracy, without regard to the question, whether the prisoner is proved to have been concerned in the particular transaction. *Phill. Ev.* 210, 8*th ed.* Thus on the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent or disaffection, as the material points for the consideration of the jury are, the general character and intention of the assembly and the particular case of the defendant as connected with that general character, it is relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting, on a spot at some distance from the place of meeting (from which spot bodies of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted themselves in a riotous, disorderly, or seditious manner. *Hunt's case*, 3 *B. & A.* 573, 574. Upon the same principle, on the trial of a similar indictment, it is relevant to produce in evidence resolutions proposed by one of the defendants at a large assembly in another part of the country, for the same professed object and purpose as were avowed at the meeting in question; and also, that the defendant acted at both meetings as president or chairman; for in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. *Hunt's case*, 3 *B. & A.* 577. See also *Redford* v. *Birley*, 3 *Stark. N. P.* 87, 88, 91. *In M'Kenna's case, Ir. Cir. Rep.* 461, cited in *Taylor on Ev. 2nd ed.* 465, Pennefather, C. J., thus laid down the law: "It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance when you seek to give in evidence against him the declaration of a co-conspirator; and having done so, you are

then at liberty to give in evidence against the prisoner acts done by any of the parties whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions."

The same rule is acted upon in cases of treason. If several persons agree to levy war, some in one place and some in another, and one party do actually appear in arms, this is a levying of war by all, as well those who were not in arms as those who were, if it were done in pursuance of the original concert; for those who made the attempt were emboldened by the confidence inspired by the general concert, and, therefore, these particular acts are in justice imputable to all the rest. 1 *East, P. C.* 97; *Kel.* 19, 3 *Inst.* 9. "But, suppose," says Mr. East, "a conspiracy to levy war, and a plan of operations settled, and those to whom the execution of them is committed afterwards see occasion to vary in certain particulars from the original plan, which is accordingly done, unknown to some of the conspirators; yet I conceive," he adds, "that if the new measures were conducive to the same end, and that in substance the original conspiracy were pursued, they all remain responsible for each other's acts." 1 *East, P. C.* 98. *Vide post, tit. Accessaries and Murder.*

Letters and writings also of one of several conspirators are frequently offered in evidence against others. In *Stone's case* (for high treason) evidence having been given to connect the prisoner with one Jackson, and to show that they were engaged in a conspiracy to transmit to the French an account of the disposition of the English, in case of an invasion, the Secretary of State was called to prove that a letter of Jackson's containing treasonable information of the state of this country, had been transmitted to him from abroad. The evidence was objected to, as the letter was not proved to have come to the prisoner's hands. But the court admitted it, on the authority of *Tooke's case* and *Hardy's case*, the acts of Jackson done in pursuance of the conspiracy being, in contemplation of law, the acts of the prisoner. *Stone's case*, 1 *East, P. C.* 99; 6 *T. R.* 527; 25 *How. St. Tr.* 1311, *S. C.*

Papers found in the custody of the prisoner are admissible in evidence, without any proof of the handwriting being his. 1 *East, P. C.* 119; *Layer's case*, 6 *St. Tr.* 279. The letters of writings must appear to have been written in furtherance of the conspiracy, and not as a mere relation of a past transaction. On the trial of Hardy, a letter from Thelwall to a third person, not connected with the conspiracy, was offered in evidence, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which the prisoner and the writer were proved to be members. It being objected that the letter was merely a relation by the writer, the majority of the court decided against the admissibility of the letter. They considered the letter not as an act done in prosecution of the plot, but a mere narrative of what had passed. "Correspondence," said Eyre, C. J., "very often makes a part of the transaction, and in that case the correspondence of one who is a party to the conspiracy, would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what has been done, appears a different thing." *Hardy's case*, 24 *How. St. Tr.* 452, 475. *Blake's case*, 6 *Q. B.* 126. *S. C.* 13 *L. J. M. C.* 131.

It is not necessary, in order to render the letter of one of several conspirators evidence, that it should ever have reached the hands of the person to whom it was addressed. Thus, in *Stone's case, ante*, p. 63, the letter which was read in evidence had been intercepted; and in *Hardy's case*, a letter written by the chairman of a meeting in London, to a delegate sent by that meeting into Holland, though never received by that person, was allowed to be read in evidence, on the ground that it was a letter written by one conspirator to another conspirator, and having relation to the conspiracy, the tendency and nature of which it contributed to show. *Hardy's case*, 24 *How. St. Tr.* 453, 477.

It is in consequence of the distinction between writings or declarations, which are acts or part of the *res gestæ*, and such as are in the nature of subsequent statements, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it were before or after the time of the prisoner's apprehension. *Phill. Ev.* 214, *8th ed.* Where, after the prisoners had been apprehended, several letters directed to them were intercepted at the post office, and were attempted to be given in evidence against them at the trial, the court said, that as they had never been in the custody of the prisoners, or any way adopted by them, they were inadmissible. *Hevey's case*, 1 *Leach*, 235. In *Hardy's case* it was proposed to give in evidence certain writings found subsequently to the apprehension of the prisoner, in the possession of Martin and Thelwall, persons charged with the same conspiracy; but it was held that as there was no evidence to show the existence of the writings previous to the prisoner's apprehension, or that he was a party to them, they could not be read. *Hardy's case*, 24 *How. St. Tr.* 452. But if there be a presumption of the previous existence of the writing, it will then be admissible. On the trial of Watson for high treason, proof was admitted of papers found in the lodgings of Watson the younger, who had been engaged in the conspiracy, after the apprehension of the prisoner, and a witness stated that similar papers had been shown to him. *Hardy's case* having been cited by the counsel for the prisoner, the court were clearly of opinion that these writings were admissible, since, in the first place, there was a strong presumption that the papers found in the room were there previously to the apprehension of the prisoner, a circumstance which very materially distinguished this case from that of Hardy, where the papers were found in the possession of persons after his apprehension; which persons might have acquired the possession after his apprehension; whereas, in the present case, the room in which the papers were found had been kept locked up by one of the conspirators; and secondly, because these papers had all a reference to the design and plan of the conspiracy as detailed in evidence. *Watson's case*, 2 *Stark. N. P.* 140.

In the same case evidence was given by Castles, an accomplice, that a quantity of pikes, made in furtherance of the conspiracy, had been carried to the lodgings of the younger Watson, and that this was communicated to the elder Watson. The latter was apprehended on the 2nd of December, and the pikes were not discovered until the 5th of March. It was objected that the evidence of the discovery of the pikes being after the prisoner's apprehension, ought not to be received; and *Hardy's case* was cited. But the court was clearly of opinion that it was admissible. In the case cited, what was offered to be produced in evidence did not exist before the apprehension, but

here the thing not only existed, but had been carried to the house by two of those who had been stated to be parties to the transaction. *Watson's case*, 2 *Stark. N. P.* 137.

Where letters and writings are offered in evidence in these cases, it must appear that they are connected with the objects of the conspiracy, and that they are not merely the speculative opinions of the party by whom they were written. But if they be so connected, then though they may never have been published, they are admissible in evidence. In *Sidney's case*, 9 *How. St. Tr.* 817, writings composed several years before the offence with which the prisoner was charged, and never published, were allowed to be read in evidence against him, a course clearly illegal; "but I freely admit," says Mr. Justice Foster, "that had the papers found in Mr. Sidney's closet been plainly relative to other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published." *Foster*, 198; 4 *Black. Com.* 80; 1 *East. P. C.* 119. In *Watson's case*, a paper containing questions and answers, found in the lodgings of the younger Watson, and tending to corrupt the soldiers, was offered in evidence; but the reception of this evidence was objected to, and *Sidney's case* was cited. Lord Ellenborough observed, that where a doubt existed, his inclination was to reject a paper offered against a defendant in such a case. That if there had been proof of a design to corrupt the soldiers by written papers circulated amongst them, this would have been evidence of a paper to effectuate that purpose; but that the contents of the paper appeared to be of too abstract a nature, and too little connected with any of the objects of the conspiracy, then in evidence. Abbott, J., distinguished *Sidney's case*. The paper there was not only then an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. He entertained considerable doubt upon the present question, but his opinion was that the paper was too abstract in its terms to be admissible. *Watson's case*, 2 *Stark.* 145.

Not only are the *acts*, and the written *letters* and *papers*, of one of several persons engaged in the same conspiracy, evidence against the others, if done or written in furtherance of the common purpose, but his verbal declarations are equally admissible under similar restrictions. Any declarations made by one of the party in pursuance of the common object of the conspiracy, are evidence against the rest of the party, who are as much responsible for all that has been said or done by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice, or executed by their own hand. These declarations are of the nature of acts; they are, in reality, acts done by the party, and generally they are far more mischievous than acts which consist only in corporal agency. All consultations therefore carried on by one conspirator, relative to the general design, and all conversations in his presence, are evidence against another conspirator, though absent. 1 *Phill. Ev.* 95, *7th ed.* The effect of such evidence must depend on a variety of circumstances, such as whether the party was attending to the conversation, and whether he approved or disapproved; still such conversations are admissible in evidence. *Per Eyre, C. J.*, *Hardy's case*, 24 *How. St. Tr.* 704. In *Lord George Gordon's case*, the cry of the mob, being part of the transaction, was held to be admissible against the prisoner. 21 *How. St. Tr.* 535. And upon the same principle, the expressions of the mob in the Sacheverell riots, that they designed to pull down

the meeting-houses, were admitted in evidence. *Damaree's case*, 15 *How. St. Tr.* 552.

Cases where evidence of other transactions is admissible, as referrible to the point in issue—admissible for prisoner as well as for prosecutor.] Evidence of other acts and declarations of the prisoner, as it is admissible for the prosecution, under the restrictions above stated, so it is also admissible on behalf of the prisoner. On a charge of murder, for instance, expressions of good will, and acts of kindness on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased; from which the jury may be led to conclude that his intention could not have been what the charge imputes. *Phill. Ev.* 1*st vol.*, p. 470, 9*th ed.* So antecedent menaces may be given in evidence, to show the prisoner's malice against the deceased. So on the trial of an information against the proprietor of a newspaper, for a seditious libel, Lord Ellenborough ruled that the defendant had a right to have any parts of the same paper, upon the same topic with the libel, or fairly connected with it, read, though locally disjoined from the libel. Passages, his lordship observed, of the same paper, tending to show the intention and mind of the defendant with respect to the specific paragraph, must be very material for the consideration of the jury. *Lambert's case*, 2 *Campb.* 398. In a case of arson, where it was opened by the counsel for the prosecution that evidence would be given of expressions of ill-will used by the prisoner to the prosecutor, Williams, J., held, that the prisoner's counsel might cross-examine the prosecutor, to show that other persons had also used expressions of ill-will towards him. *Stallard's case*, 7 *C. & P.* 263.

As in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to be held in pursuance of the conspiracy, is admissible in evidence on the part of the prosecution against him; so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved on his behalf; for the intention and design of a party at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. *Phill. Ev.* 499, 8*th ed.* On the trial of an indictment for a conspiracy to overthrow the government, evidence was given to show that the conspiracy was brought into overt act, at meetings, in the presence of the prisoner Walker. His counsel was allowed to ask, whether at those times he had heard Walker utter any word inconsistent with the duty of a good subject. He was also allowed to inquire into the general declarations of the prisoner at the meetings, and whether the witness had heard him say any thing that had a tendency to disturb the peace. *Ibid.* 23 *How. St. Tr.* 1131; 31 *Id.* 43.

The acts and declarations of a prisoner, given in evidence in his favour, ought to be connected, both in point of subject-matter, and of time, with the acts or declarations proved against him. *See Phill. Ev.* 500, 8*th ed.* In the two following cases, however, great latitude was allowed on trials for high treason. Where the overt act charged was, that the prisoner, to compass the king's death, conspired with others to call a convention of the people, &c.; the prisoner's counsel was allowed to ask the witness whether, *before the time of the convention*, he had ever heard from the prisoner what his objects were, and

whether he had at all mixed himself in the business. *Hardy's case*, 24 *How. St. Tr.* 1097. So in *Horne Tooke's case*, 1 *East. P. C.* 61; 25 *How. St. Tr.* 545, evidence having been given on the part of the crown, of several publications containing republican doctrines and opinions, which had been distributed by the prisoner during the period assigned in the indictment (for high treason) for the existence of the conspiracy, the prisoner offered to put in a book written by him, expressive of his veneration for the king and constitution; this was objected to, as being antecedent to the period of the conspiracy, and not relating to the particular transaction. After argument, the book was admitted, on the ground that it had reference to the proof given in support of the charge, to rebut the idea, that a reform in Parliament was a pretence made by the prisoner, and that his real object was to overturn the government. The soundness of this decision has been doubted by Lord Ellenborough, who said, that if the point should ever occur before him, it would become his duty seriously to consider whether such evidence should be admitted. *Lambert's case*, 2 *Campb.* 409. In the following case, a more strict limit was placed to the investigation of the acts and declarations of a prisoner. On the trial of Lord George Gordon, a witness was asked by his counsel, on cross-examination, as to a statement made by the prisoner on *the night before the meeting*, in St. George's Fields, and with respect to which such evidence had been produced. The question was over-ruled, and Lord Mansfield said that, as the counsel for the crown had given evidence of what the prisoner said at the meeting, on the 29th of May, the counsel for the prisoner might show the whole connection of what the prisoner said besides, at that meeting, but that they could not go into evidence of what he said on an antecedent day. 21 *How. St. Tr.* 542. So in *Hanson's case*, on the charge of promoting a riot, the prisoner's counsel was not allowed to prove what he had said privately to a friend, previously to his going to the place of riot, respecting his motives in going thither. 31 *How. St. Tr.* 1281.

On the trial of an indictment for a conspiracy to defraud, the written correspondence of the defendant, with another of the conspirators, relating to a transaction in question was allowed to be read, in order to show that the defendant was deceived by his correspondent, and was not a participator in the fraud. *Per* Best, J., "I think them admissible; for what the parties say at the time is evidence to show how they acted." *Whitehead's case*, 1 *C. & P.* 67.

Cases where evidence of other transactions is admissible as referrible to the point in issue—cumulative offences.] Where the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those various acts, so far from being inadmissible, is essential to the proof of the charge. Thus on an indictment against the defendants for a conspiracy, to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen; after proof of a representation to one tradesman evidence was offered of a representation to another tradesman at a different time, and admitted by Lord Ellenborough, who said that cumulative instances were necessary to prove the offence, and that the same sort of evidence was allowed on an indictment for barratry. *Robert's case*, 1 *Campb.* 399.

Cases where evidence of other transactions is admissible as refer-

rible to the point in issue—guilty knowledge.] In various cases it is necessary to prove a guilty knowledge in the prisoner, with regard to the transaction in question; and for this purpose evidence may be given of circumstances not connected with, though in some measure relative to, the particular offence, in order to raise a presumption of a guilty knowledge in the prisoner at the time of the offence committed. On this ground evidence of other offences of the same kind, committed by the prisoner, though not charged in the indictment, is admissible against him.

This evidence most commonly occurs in cases of indictments for uttering forged instruments, knowing them to be forged, and false coin, knowing it to be counterfeit, in which the guilty knowledge is the principal ingredient of the offence. The prisoner was charged with uttering a Bank of England note, knowing it to be forged; evidence was offered for the prosecution, that the prisoner had uttered another forged note in the same manner, by the same hand, and with the same materials, three months preceding, and that two ten pound notes and thirteen one pound notes of the same fabrication, had been found on the files of the company, on the back of which there was the prisoner's handwriting, but it did not appear when the company received them. This evidence was admitted, but the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation, as to the weight of it, which would be more or less considerable, according to the number of the notes, the distance of the time at which they had been put off, and the situation of life of the prisoner, so as to make it more or less probable, that so many notes could pass through his hands in the course of business. *Ball's case, Russ. & Ry.* 132; 1 *Campb.* 324, *S. C.* The prisoners were indicted for uttering bank notes, knowing them to be forged. The trial took place in April, and to prove their guilty knowledge, evidence was given, that in February they had uttered, on three several occasions, forged bank notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses; and the court was of opinion that this evidence was admissible. Lord Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanour of the prisoner on other occasions, from which it might fairly be inferred that the prisoner was conscious of his guilt, whilst he was doing the act charged upon him in the indictment. Heath, J., said, "The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." *Whiley's case*, 2 *Leach*, 983; 1 *New Rep.* 92, *S. C.*

Not only is evidence of the act of passing other forged notes admissible to prove the prisoner's guilty knowledge, but proof of his general demeanour on a former occasion will be received for the same purpose. The prisoner was indicted for forging and knowingly uttering a bank note, and the question was, whether the prosecutor, in order to show that the prisoner knew it to be forged, might give the conduct of the prisoner in evidence, that is, whether from the conduct of the prisoner on one occasion, the jury might not infer his knowledge on another, and all the judges were of opinion that such evidence ought to be received. *Tattershall's case, cited by Lord Ellenborough*, 2 *Leach*, 984.

It has been decided that it is not necessary that the other forged notes should be of the same description and denomination as the note in question. *Harris's case*, 7 *C. & P.* 429. The point was doubted in *Millard's case*, *R. & R.* 245; but recently in *Foster's case*, 24 *L. J. M. C.* 134, the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offence charged that the evidence of it was receivable." In *Ball's case*, 1 *Moo. C. C.* 470, the prisoner was indicted for forging and uttering a note in the Polish language. In support of the *scienter* the prosecutor gave evidence of the particulars of a meeting at which the prisoner agreed with the prosecutor (who was an agent of the Austrian government, and had been sent over to endeavour to detect persons implicated in the forgeries of Austrian notes) to make him 1000 Austrian notes for fifty florins. This evidence was objected to on the part of the prisoner, as it was a transaction relative to notes of a different description from the notes in the indictment, besides which no Austrian notes were in fact made. Littledale, J., however, admitted the evidence, and the prisoner was found guilty, but judgment was respited, that the opinion of the judges might be taken, who held the evidence admissible. *Ball's case*, 1 *Moody, C. C.* 470; 7 *C. & P.* 426, 429.

It appears, that by the Scotch law evidence of other forged notes is admissible, though they be not of the same description as those forged. "The most important circumstance," says an eminent writer on the criminal law of Scotland, "and which is generally, *per se*, decisive as to guilty knowledge, is if other forged notes are found on the prisoner. If four or five forged notes, and especially forgeries on the same bank with that uttered, and found on the prisoner, it is hardly possible to form any other conclusion, than that he is a dealer in these dangerous instruments, caught in the very act of disposing of them. This will amount to a moral certainty of the other forged concealed in his possession, as in his hat, in a concealed pocket, sewed between his coat and the lining, or the like. On the other hand, the weight of this circumstance, always great, must be dismissed, if the notes found on him were nowise concealed, and were exhibited by him without any suspicious circumstances or appearance of conscious guilt." *Alison on the Princ. of the Cri. Law of Scotland*, 420.

Though evidence of the uttering of other forged notes may be given to show guilty knowledge, yet what was said at another time by the prisoner respecting those utterings, is inadmissible. Where evidence to this effect was tendered, Bayley, J., stopped it, and said, "The prosecutor is at liberty to show other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them. But what he said or did at another time, collateral to such other utterings, cannot be given in evidence; as it is impossible that the prisoner can be prepared to contradict it." *Phillips' case*, 1 *Lewin, C. C.* 105.

Whether, where the other forged note, the issuing or possession of which is proposed to be given in evidence, in proof of guilty knowledge, is the subject, at the time, of another indictment, is admissible in evidence, was formerly doubted; but upon principle there

appears to be no objection to the reception of such evidence. In one case, where such evidence was tendered, Vaughan, B., refused to receive it; *Smith's case*, 2 *C. & P.* 633; but in another case, where the objection was taken, Littledale, J., without hesitation overruled it, and the prisoner was convicted. *Kirkwood's case*, 1 *Lewin, C. C.* 103. See also *Martin's case, Ibid.* 104. *Josiah Ashton's case*, 2 *Russ. by Greaves*, p. 407. *Lewis's case, Archb. Cr. Law*, 365, 8*th ed.*

The *possession* also of other forged notes by the prisoner is evidence of his guilty knowledge. The prisoner was indicted for uttering a bill of exchange upon Sir James Esdaile and Co., knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same parties. On a case reserved, the judges were all of opinion, that these forged bills found upon the prisoner at his apprehension, were evidence of his guilty knowledge. *Hough's case, Russ. & Ry.* 121. In order however to render such evidence admissible, it must be proved that the other notes were forged, and they ought to be produced. *Millard's case, Russ. & Ry.* 245; *Cooke's case*, 8 *C. & P.* 586; and see *Forbes's case*, 7 *C. & P.* 224, *post, tit. Forgery.* It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received. *Phill. Ev.* 473, 9*th ed.* (*n.*)

On the trial of indictments for uttering or putting off counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment. 1 *Russ.* 85; 2 *Russ.* 697. In *Whiley's case* (*see ante, p.* 88), it was stated by the counsel for the prisoner, in argument, that upon an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment. Upon this, Thompson, B., observed, "As to the case put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." 2 *Leach*, 986. Also proof of the prisoner's conduct in such other utterings (as for example, that he passed by different names) is for the same reason clearly admissible. See *Tattershall's case, ante*, p. 88; *Phillips' case, ante*, p. 89. Such evidence far from being foreign to the point in issue is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge, and it would seldom be possible to ascertain under what circumstances the uttering took place (whether with ignorance or with an intention to commit fraud), without inquiring into the demeanour of the prisoner in the course of other transactions. *Phill. Ev.* 473, 9*th ed.*

It was held by Bayley, J., that evidence could not be given of what the prisoner said at the time collateral to a former uttering, in order to show that what he said at the time of such former uttering was false. *Phillips' case, ante, p.* 89.

With regard to the guilty knowledge of a receiver of stolen goods,

it is laid down, that buying the goods at a lower value than they are worth, is presumptive evidence that the buyer knew they were stolen. 1 *Hale*, *P. C.* 216; 2 *East*, *P. C.* 765. Where upon an indictment for receiving, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times; the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury, that they might take into their consideration the circumstance of the prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether when she received the articles for which the prosecutor elected to proceed, she knew them to have been stolen. *Dunn's case*, 1 *Moody*, *C. C.* 150. But where the prisoner being indicted in one count for stealing, in another for receiving knowing it to have been stolen, certain cloth, it was proved that the cloth was stolen in the night of the 2nd and 3rd March, and found in the possession of the prisoner on the 10th March; and it was sought further to give in evidence, in order to show guilty knowledge, that on his house being searched on the 10th March other cloth which had been stolen in the December previous from other parties, was found; the Court of Criminal Appeal held that such evidence was inadmissible. Alderson, B., in giving his judgment, said, "The mere possession of stolen property is evidence *primâ facie* not of receiving but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property* with a guilty knowledge which had been stolen in *March*, to show that the prisoner had in the *December* previous *stolen* some other property from another place and belonging to other persons. In other words, we are asked to say, that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony some time before; such evidence cannot be admissible." *Oddy's case*, 2 *Den. C. C. R.* 264, *S. C.* 20 *L. J. M. C.* 198. But this decision does not apply to the case of uttering forged notes; *per Cresswell, J.*, *Green's case*, 3 *C. & K.* 209.

Evidence of facts subsequent to the offence charged—how for admissible to prove guilty knowledge.] It may be thought that collateral evidence of facts, occurring soon after the offence with which a prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge as when the facts occurred at some time before the offence; *Phill. Ev.* 474, *9th ed.*; but it would seem from some of the cases that where evidence is given of collateral circumstances to show the prisoner's guilty knowledge, it must, in general, appear that those circumstances occurred previously to the commission of the offence with which he is charged. Thus on an indictment for forging a bank note, a letter purporting to come from the prisoner's brother, and left by the postman, pursuant to the direction, at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, cannot be read in evidence against him. *Huet's case*, 2 *Leach*, 820. So on an indictment for uttering a forged bank note, to show the guilty knowledge, the prosecutors offered to prove the uttering of another forged note five weeks *after* the uttering, which was the subject of the indictment; but the court (Ellenborough, C. J., Thompson, C. B., and Lawrence, J.,) held that the evidence was not admissible, unless the latter

uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture*. *Taverner's case*, *Carr. Sup.* 195, 1*st ed.*, 4 *C. & P.* 413, (*n.*) *S. C.* Where on an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange *precisely similar*, with the same drawers' and acceptors' names, uttered by the prisoner, about a month after the uttering of the bill mentioned in the indictment, Mr. Justice Gaselee, after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges, upon which the counsel for the prosecution declined to press the evidence. *Smith's case*, 4 *C. & P.* 411. But see *Foster's case*, *ante*, p. 89.

Cases where evidence of other transactions is admissible when referrible to the point in issue—questions of intent.] As evidence of other facts is admissible when those facts tend to prove the point in issue, as to show the identity, or to establish the proximity of the prisoner at the time in question (*vide*, *ante*, *p.* 81); so where the *intent* of the prisoner forms part of the matter in issue, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the prisoner in committing the act in question. Thus on an indictment for maliciously shooting, evidence was given that the prisoner, about a quarter of an hour before the shooting with which he was charged, intentionally shot at the prosecutor. It was suggested that this was evidence of two distinct felonies; but Burroughs, J., said it was unavoidable in this case, as it seemed to him to be one continued transaction in the prosecution of the malicious intent of the prisoner; and the judges held that the evidence was rightly admitted. *Voke's case*, *Russ. & Ry.* 531. So on a charge of sending a threatening letter, other letters written by the prisoner, both before and after that in question, may be read in evidence as serving to explain the letter upon which he is indicted. *Robinson's case*, 2 *East*, *P. C.* 1110; 2 *Leach*, 749, *S. C.* So subsequent declarations by the prisoner of the meaning of the letter are admissible. *Tucker's case*, 1 *Moody*, *C. C.* 134. So on an indictment for threatening to accuse a person of an abominable crime, if the expressions used are equivocal, the jury may connect them with what was said afterwards by the prisoners when taken into custody. *Per Park, J.*, *Kain's case*, 8 *C. & P.* 187. See also *Egerton's case*, and *Winkworth's case*, *ante*, *p.* 81.

Evidence of the murder of one person may be given upon the trial for the murder of another person, if such evidence tends to show that the prisoner might have had a motive arising out of the other murder for committing the murder with which he is charged. Upon an indictment for the murder of one Hemmings, it was opened that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot, and that the rector was shot by Hemmings, and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered Hemmings, and that Hemmings' bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, showing that he entertained malice against the rector, it was proposed to show that Hemmings was the person by whom the rector was murdered, it was objected that this

was not admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., "I think that I must receive the evidence. On the part of the prosecution, it is put thus—that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt. Now, to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker." *Clewes's case*, 4 *C. & P.* 221.

Upon the same principle in actions for libels or words, evidence of other libels or words may be given to show the *animus* of the defendant, whether the words be spoken before or after those in question. *Charlton* v. *Barrett*, *Peake*, 22; *Rutsell* v. *Macquister*, 1 *Camp.* 49, (*n.*); *Stuart* v. *Lovell*, 2 *Stark.* 95, where Lord Ellenborough, C. J., observed, that subsequent publications would be admissible in the case of an indictment to show the intent of the party. In *Long* v. *Barrett*, 3 *H. of L. Cas.* 395, it was held, that in an action of libel with a view of showing the *animus* of the defendant, other libels published by him against the plaintiff six years before, might be given in evidence. So in *Pearson* v. *Lemaitre*, 6 *Scott. N. R.* 607, a letter written subsequently to the commencement of the action, and fourteen months after libel complained of, was admitted in evidence.

So the *declarations* of a prisoner made at a former time are admissible, where they tend to prove the intent of the party at the time of the commission of the offence. Thus on an indictment for murder, evidence of former grudges and antecedent menaces may be given to show the prisoner's malice against the deceased. 2 *Phill. Ev.* 498, 8*th ed.*, 1*st vol.*, p. 476, 9*th ed.* So in treason, what was said by the prisoner with respect to what was passing at the time of the transaction laid as the overt act, may be received in evidence to explain his conduct, and to show the nature and object of the transaction. *Watson's case*, 2 *Stark.* 134.

Evidence of the character of the prosecutor.] Where the prosecutor appears as one of the witnesses, evidence of his character, with regard to veracity, will be admitted as in the case of other witnesses. *Vide post.* And in some particular cases, where the character of the prosecutor is mingled with the transaction in question, it forms a point material to the issue, and may consequently be inquired into. Thus in the case of an indictment for rape, evidence that the woman had a bad character previously to the commission of the offence, is admissible; and the same principles apply with regard to an indictment for an assault with intent to commit a rape. *Per Holroyd, J.*, *Clarke's case*, 2 *Stark. N. P.* 244; *Phill. Ev.* 489, 8*th ed.*, 1*st vol.*, p. [illegible], 9*th ed.* But in these cases *general* evidence of character only is admissible and not evidence of particular facts. *Id.* Thus where, on an indictment for a rape, the prosecutrix was asked whether she had not before had connexion with other persons, and with a particular person named? the judges held that the witness was not bound to answer these questions, as they tended to criminate and disgrace herself; and evidence having been offered to prove that the prosecutrix had had connexion with a man before this charge, the judges also determined that this evidence was properly rejected. *Hodgson's case*, *Russ. & Ry.* 211. See also *Martin's case*, and *Baker's case*, *post*, *tit. Rape.* Mr. Phillipps observes on this case (1*st vol.* p. 496), that the evidence was held inadmissible "on the alleged

ground that the prosecutrix could not be prepared to answer evidence of particular facts. Perhaps it may be considered that the question of the woman's chastity is not directly in issue upon such charges, as it is in actions for crim. con. and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge; and the alleged objection to the evidence is in some degree obviated by the power, as in actions of seduction, of producing general evidence of good character in reply." However, in *Barker's case*, 3 *C. & P.* 589, on a trial for rape, Park, J., (after consulting Mr. Justice James Parke) allowed the prisoner's counsel to ask the prosecutrix, with a view to contradict her, whether since the alleged offence, she had not walked in the town of Oxford to look out for men, and whether she had not walked in High-street with a woman reputed to be a common prostitute. And the following case seems to decide that not only may the prosecutrix be asked as to particular facts, but that they may be proved, should she deny them. The prosecutrix having denied on cross-examination that she was acquainted or had had connexion with several men named and shown to her at the time she was questioned, the counsel for the defence proposed to call these persons to contradict her. Their evidence was objected to as inadmissible, and *Hodgson's case*, *ante*, p. 93, was cited. Coleridge, J., after consulting Erskine, J., said that neither he nor that learned judge had any doubt on the question. "It is not immaterial to the question whether the prosecutrix has had this connexion against her consent to show that she has permitted other men to have connexion with her, which on her cross-examination she has denied." The witnesses were accordingly examined, and the prisoner was acquitted. *Robins's case*, 2 *Moo. & R.* 512. Evidence is admissible that the prosecutrix had formerly been connected with the prisoner. 2 *Stark. Ev.* 216, *2nd ed.*, *citing Hodgson's case*, *supra*; and a case, *cor. Wood, B.*, *York Sum. Ass.* 1812; 3 *Stark. Ev.* 952, *3rd ed.*, *citing R.* v. *Aspinall*, *cor. Hullock, B.*, *York Spr. Ass.* 1829. Where, on a trial of an indictment for an assault, with intent to commit a rape, the prosecutrix was asked, on cross-examination, whether she had not been twice in the house of correction many years ago, and she admitted that she had; Holroyd, J., held that a witness might be examined on behalf of the prosecution as to her situation and conduct since, in order to repel the inference which might be drawn from her former misconduct. *Clarke's case*, 2 *Stark. N. P.* 241.

Evidence of the character of the prisoner.] In trials for high treason, for felony, and for misdemeanors (where the direct object of the prosecution is to punish the offence), the prisoner is always permitted to call witnesses to his general character; and in every case of doubt, proof of good character will be entitled to great weight. 2 *Phill. Ev.* 490, *8th ed.*; 1*st vol.*, p. 469, 9*th ed.* The rule does not extend to actions or informations for penalties, as to an information for keeping false weights. *Attorney-General* v. *Bowman*, 2 *Bos. & Pul.* 532, (*n.*) To admit such evidence in that case would be contrary to the true line of distinction, which is this, that in a direct prosecution for a crime it is admissible, but where the prosecution is not directly for the crime, but for the penalty, it is not. If evidence of character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the excise and custom-house laws. *Per Eyre, C. J., Ibid.* The inquiry as to the

prisoner's general character ought manifestly to bear some analogy and reference to the charge against him. On a charge for stealing, it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct, which, however, they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is, therefore, totally inapplicable to the point in question. The inquiry must also be as to the *general* character; for it is the general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act a dishonest, unworthy part. 2 *Phill. Ev.* 490, *8th ed.*; 1*st vol.*, p. 469, *9th ed.* Proof of particular transactions in which the defendant may have been concerned, is not admissible as evidence of his general good character. It frequently happens that witnesses, after speaking to the general opinion of the prisoner's character, state their own personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character. *Id.*

In cases where the intention forms a principal ingredient in the offence, a wider scope is allowed. On a charge of murder, for instance, expressions of goodwill and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence. 1 *Phill. Ev.* 470. So evidence of antecedent menaces is admissible against the prisoner.

"It has been usual," says a very sensible writer, "to treat the good character of the party accused as evidence to be taken in consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the prisoner, character, however excellent, is no subject for their consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." 2 *Russ. by Greaves*, 786. The prosecutor cannot enter into evidence of the defendant's bad character, unless the latter enable him to do so, by calling witnesses in support of his good character, and even then the prosecutor cannot examine as to particular facts. *B. N. P.* 296. *Hurd* v. *Martin*, *Cowp.* 331. It is not usual to cross-examine witnesses to the character of a prisoner, unless the counsel have some definite charge to which to cross-examine them. *Per Alderson, B.*, *Hodgkiss's case*, 7 *C. & P.* 298. See further, *post*, *tit. Practice.*

SUBSTANCE OF THE ISSUE TO BE PROVED.

General rule.] A general rule governing the application of evidence to the points in disputes on any issue, is that it must be sufficient to prove the substance of the issue. *Phill. Ev.* 845, 8*th ed.*

14 & 15 *Vict. c.* 100, *ss.* 9 & 12.] The law in this respect has been materially altered by this statute. Sect. 9 enacts, that "if upon the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

Sect. 12 enacts that, "if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be

had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

The greater number of the cases on this subject, may be classed under the two heads of divisible and descriptive averments.

Divisible averments—sufficient to prove what constitutes an offence.] It is a distinction (or rather principle) which runs through the whole criminal law, that it is enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified. *Per Lord Ellenborough, Hunt's case*, 2 *Camp.* 585. So it was said by the court, in *Hollingberry's case*, 4 *B. & C.* 329, "In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law."

The offence, however, of which the defendant is convicted, must be of the same class with that with which he is charged. Thus upon an indictment for a felony in stealing a parchment, it appearing that it concerned the realty, and that the prisoner could not, therefore, be convicted of the felony, it was urged that he might receive judgment as for a trespass, and for this the *Year Book*, 2 *H.* 7. 10 *and* 22, *Cro. Car.* 332; *Kel.* 29; *Cro. Jac.* 497; 1 *And.* 351; and *Dalt.* 321, were cited; but the court, having observed upon these cases, and shown that they were repugnant to the rules of law and the principles of justice, directed the prisoner to be discharged. *Westbeer's case*, 1 *Leach*, 14; 2 *Str.* 1133, *S. C.* Upon an indictment for *petit treason*, if the killing with malice was proved, but not with such circumstances as to render the offence petit treason, the prisoner might still have been found guilty of wilful murder upon that indictment. *Swan's case, Foster*, 104. So upon an indictment for *murder*, the prisoner may be convicted of manslaughter. *Gilb. Ev.* 262. *Macalley's case*, 9 *Rep.* 67, *b*; *Co. Litt.* 282, *a*. And where a man was indicted on the statute of 1 Jac. 1. for stabbing, *contra formam statuti*, it was held, that the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. *Harwood's case, Style*, 86; 2 *Hale, P. C.* 302. Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony, and acquit him of the burglary. 2 *Hale, P. C.* 302. So where the indictment was for a burglary and larceny, and the jury found the prisoner guilty of stealing to the amount of 40*s.* in a dwelling-house (12 Ann. c. 7, repealed by 7 & 8 Geo. 4, c. 27), the judges were of opinion that by this verdict the prisoners were ousted of their clergy, the indictment containing every charge that was required by the statute. *Withal's case*, 1 *Leach*, 89; 2 *East, P. C.* 515, *stated post*. So on an indictment for stealing in a dwelling-house, persons therein being put in fear, the prisoner may be convicted of the simple larceny. *Etherington's case*, 2 *Leach*, 671; 2 *East, P. C.* 635. Again, if a man be indicted for robbery, he may be found guilty of the larceny, and not guilty of the robbery. 2 *Hale P. C.* 302. And in all cases of larceny, where, by statute, circumstances of aggravation subject the offender to a higher punishment, on failure in the proof of those circumstances, the prisoner may be convicted of the simple larceny. Thus, on an indictment for horse stealing under a statute, the prisoner may be found guilty of a simple larceny. *Beaney's case, Russ. &*

Ry. 416. But where upon an indictment for robbery from the person, a *special verdict* was found, stating facts which, in judgment of law, did not amount to a taking from the person, but showed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, whether the prisoners were or were not guilty of the felony or robbery charged against them in the indictment, the judges thought that judgment, as for larceny, could not be given upon that indictment, but remanded the prisoners to be tried upon another indictment. *Frances's case*, 2 *East*, *P. C.* 784.

In misdemeanors as well as in felonies, the averments of the offence are divisible. Thus in an information for a libel, it was stated that the defendants *composed, printed, and published* the libel; the proof extended only to the publication; but Lord Ellenborough held this to be sufficient. *Hunt's case*, 2 *Camp.* 584. So where an indictment charges that the defendant *did, and caused to be done* a certain act, as *forged and caused to be forged*, it is sufficient to prove either one or the other. *Per Lord Mansfield, Middlehurst's case*, 1 *Burr.* 400. *Per Lord Ellenborough, Hunt's case*, 2 *Campb.* 585. Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part, is sufficient. *Hill's case, Russ. & Ry.* 190. So upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *Rhodes's case*, 2 *Raym.* 886. So on an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy, to prevent one workman from working. *Bykerdike's case*, 1 *M. & Rob.* 179.

With regard to the extent of the property as to which the offence has been committed, the averments in the indictment are divisible. Whatever quantity of articles may be stated in an indictment for larceny to have been stolen, the prisoner may be convicted, if any one of those articles be proved to have been feloniously taken away by him. Where the prisoner was indicted under the 7 Geo. 3, c. 50, for that he, being a post boy and rider employed in the business of the post office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*; the prisoner being convicted, it was held by the judges, that the statement in the indictment not being descriptive of the letter, but of the offence, the conviction was right. *Ellins's case, Russ. & Ry.* 188. In the same manner upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *Per Holt, J.*, 1 *Lord Raym.* 149. So upon an indictment on the 9 Ann. c. 14, s. 5, for winning more than 10*l.* at one sitting, Lord Ellenborough held that the defendant might be convicted of winning a less sum than that stated in the indictment, though it would have been otherwise if the prosecutor had averred that the defendant had won bills of exchange of a specified amount. *Hill's case*, 1 *Stark. N. P.* 359. Where in an indictment for embezzling, it was averred that the prisoner had embezzled divers, to wit, two bank notes for one pound each, and one bank note for two pounds, and the evidence was that he had embezzled one pound note only, this was held sufficient. *Carson's case, Russ. & Ry.* 303.

On an indictment charging several persons with an offence, any one of them may be convicted. But they cannot be found guilty separately

of separate parts of the charge. Where A. & B. were indicted under the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found A. guilty as to part of the articles of the value of 6*l.*, and B. guilty as to the residue, the judges held, that judgment could not be given against both; but that, on a pardon or *nolle prosequi* as to B., it might be given against A. *Hempstead's case, Russ. & Ry.* 344.

Divisible averments—intent.] Where the *intent* of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only. Thus on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with *either* of those intentions, they ought to find him guilty. *Evans's case*, 3 *Stark. N. P.* 35. So where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention carnally to know her, Holroyd, J., held, that the averment of intention was divisible, and the prisoner received sentence of imprisonment for twelve months. *Dawson's case*, 3 *Stark. N. P.* 62. Where an intent is unnecessarily introduced in an indictment, it may be rejected. *Jones's case*, 2 *B. & Ad.* 611.

Descriptive averments—the property stolen or injured.] Where a person or a thing necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, subject to the power of amendment now given by the 14 & 15 Vict. c. 100, otherwise it would not appear that the person or thing is the same as that described in the indictment.

The prisoner, before the passing of the 14 & 15 Vict. c. 100, was indicted for stealing four live tame turkeys. It appeared that he stole them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried. The judges held that the word *live* in the description, could not be rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed, that an indictment for stealing a dead animal, should state that it was dead; for upon a general statement, that a party stole the animal, it is to be intended that he stole it alive. *Edwards's case, Russ. & Ry.* 497.

The following cases have occurred of variances in the description of the animals. On an indictment upon the 15 Geo. 2, c. 34, which mentioned both *cows* and *heifers*, it was held that a beast two years and a-half old, which had never had a calf, was wrongly described as a cow. *Cook's case*, 2 *East, P. C.* 616; 1 *Leach*, 105. The prisoner being indicted under the 9 Geo. 1, c. 22, for killing "certain cattle, to wit, one *mare;*" the evidence was, that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain mare," though under a *videlicet*, were not surplusage, and

that the animal proved to have been killed, being a *colt* generally without specifying its sex, was not sufficient to support a charge of killing a *mare*. *Chalkley's case, Russ. & Ry.* 258. But where a statute mentions only the grown animal, the young is included, and it is no variance to describe the young animal as if it had been the grown animal. Thus, upon an indictment on the 2 & 3 Ed. 6, which mentioned the words "horses, geldings, and mares," it was held, that foals and fillies were included in those words, and that evidence of stealing a mare filly, supported an indictment for stealing a mare. *Welland's case, Russ. & Ry.* 494. Now upon any objection being taken on the point of variance between the proof on the trial, and the allegation in the indictment of "the name or description of any matter or thing whatsoever therein named or described," if the court "shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits," they may order "such indictment to be amended according to the proof," 14 & 15 Vict. c. 100, s. 1, *post*, p. 107.

Descriptive averments—the name of the prosecutor or party injured.] The name, both christian and surname, of the person in whom the property is vested, which has been stolen, &c., or upon whom the offence is charged to have been committed, is matter of description, and must be proved as laid. But if the name of the prosecutor be that by which he is usually called and known, it is sufficient. The prisoner was tried for stealing the goods of Mary Johnson. The prosecutrix stated, that her original name was Mary Davis, but that she had been called and known by the name of Johnson for the last five years, and that she had not taken the name of Johnson for concealment or fraud; the judges were clearly of opinion that the time the prosecutrix had been known by the name of Johnson, warranted her being so called in the indictment, and that the conviction was right. *Norton's case, Russ. & Ry.* 510. So in a late case, where the prisoner was indicted for stealing the goods of *Richard* Pratt, and it appeared that his name was Richard *Jeremiah* Pratt, but he was equally well known by the name of *Richard* Pratt, it was ruled that the indictment was sustained. *Anon.* 6 *C. & P.* 408; see also *Berriman's case*, 5 *C. & P.* 601. Where in an indictment a boy was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D, Williams, J., after consulting Alderson, B., held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. *Williams's case*, 7 *C. & P.* 298. Upon an indictment for the murder of a bastard child, described in the indictment as "George Lakeman Clark," it appeared it had been christened "George Lakeman," being the names of its reputed father; that it was called George Lakeman, and not by any other name known to the witnesses; and that the mother called it George Lakeman. There was no evidence that it had obtained, or was called by, its mother's name of Clark. The judges held, that as this child had not obtained his mother's name by reputation, he was improperly called *Clark* in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. *Clark's case, Russ. & Ry.* 358. When an unmar-

ried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described [illegible] by her maiden name, this was held to be sufficient. *Turner's case*, 1 *Leach*, 536. Although where there are father and son of the same name, and that name is stated without any addition, it shall be *primâ facie* intended to signify the father, *Wilson* v. *Stubs*, *Hob.* 330; *Sweeting* v. *Fowler*, 1 *Stark.* 106; yet on an indictment containing the name without addition, it may be proved that either the father or son was the party intended. Thus on an indictment for an assault upon Elizabeth Edwards, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; the defendant being convicted, the conviction was held good. *Peace's case*, 3 *B.* & *A.* 580. So where an indictment laid the property of a house in J. J., it was held by Parke, J., to be supported by proof of property in Joshua Jennings the younger. *Hodgson's case*, 1 *Lew. C. C.* 236, *S. P. Per Bolland, B.*, *Bland's case Ib.*

Any variance between the proof of the name of the prosecutor or of the party injured, and the statement of the same in the indictment, may now be amended, under the 15 & 15 Vict. c. 100, if the court "shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced in his defence on such merits." See *post*, p. 107.

An indictment is good, stating that the prisoner stole or received the goods of a person *to the jurors unknown*; but in case the owner of the goods be really known, an indictment alleging the goods to be the property of a person unknown, would be improper, and the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. 2 *Hale, P. C.* 621. Where the property was laid in one count as belonging to certain persons named, and in another as belonging to persons unknown, and the prosecutor failed to prove the christian names of the persons mentioned in the first count; it was held by Richards, C. B., that he could not resort to the second count; and the prisoner was acquitted. *Robinson's case*, *Holt, N. P. C.* 595. An indictment against the prisoner as accessary before the fact to a larceny, charged that *a certain person to the jurors unknown*, feloniously stole, &c., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but Le Blanc, J., interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *Walker's case*, 3 *Campb.* 264; see also *Blick's case*, 4 *C.* & *P.* 377.* But where an indictment stated that a certain person to the jurors unknown, burglariously entered the house of H. W., and stole a silver cream jug, &c., which the prisoner feloniously received, and it appeared that amongst the records of indictments returned by the same grand jury, there was one charging Henry Moreton, as principal in the burglary, and the prisoner as accessary in receiving the cream jug; that H. W.'s house had been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges, that

the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M., being no objection to the other indictment. *Bush's case, Russ. & Ry.* 372. See also *Caspar's case, M. C. C. R.* 101.

It is not necessary that there should be any *addition* to the name of the prosecutor or prosecutrix in an indictment; all the law requires upon this subject, is certainty to a common intent. *Per cur. Sull's case*, 2 *Leach*, 862. The prisoner was indicted (before the 39 & 40 Geo. 3, c. 77, the act of union) for stealing the goods of James Hamilton, Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland; and it appeared that he was an Irish peer. The judges were of opinion, that "James Hamilton, Esq.," was a sufficient description of the person and degree of the prosecutor, and that the subsequent words, "commonly called Earl of Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage. But they conceived that the more correct and perfect mode of describing the person of the prosecutor would have been, "James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland," and as that more perfect description appeared upon the face of the indictment, by considering the intervening words, "commonly called," as surplusage, they thought that the indictment was good. *Graham's case*, 2 *Leach*, 547; 1 *Stark. C. P.* 206. So where the prisoner was indicted for stealing the goods of A. W. Gother, *Esq.*, Burrough, J., held that the addition of esquire to the name of the person in whom the property is laid, is mere surplusage and immaterial. *Ogilvie's case*, 2 *C. & P.* 230. Where a person has a name of dignity, he ought to be described by that name; and as it forms part of the name itself, and is not an addition merely, it must be proved as laid. *Archb. C. L.* 26, *7th ed.*; 2 *Russ.* 708 (*n*). See *Frost's case, post*, p. 107.

Descriptive averments—the name of the prosecutor or party injured—rule of idem sonans.] Where a name which is material to state, is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. Thus where the name in the indictment was *John Whyneard*, and it appeared that the real name was *Winyard*, but that it was pronounced *Winnyard*, the variance was held to be immaterial. *Foster's case, Russ. & Ry.* 412. So *Segrave* for *Seagrave, Williams* v. *Ogle*, 2 *Str.* 889. *Benedetto* for *Beniditto, Abithol* v. *Beniditto*, 2 *Taunt.* 401.

Descriptive averments—the names of third persons mentioned in the indictment.]. Before the passing of the 14 & 15 Vict. c. 100, not only must the names descriptive of the prosecutor or party sustaining the injury have been strictly proved, but where the name of a third person was introduced into the indictment, as descriptive of some person or thing, that name also must have been proved as laid. On an indictment upon the black act, for maliciously shooting A. Sandon, in the dwelling-house of *James* Brewer and *John* Sandy, it appearing in evidence that it was in the dwelling-house of *John* Brewer and *James* Sandy, the court said, that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance. The statute says, "Who shall maliciously shoot at any person, in any dwelling-house or other place," and the prosecutor having averred that it was in the house of *James Brewer* and *John Sandy*, was bound to prove it as it was laid. *Durore's case*, 1 *Leach*, 352; 1 *East, P. C.* 45. So where the indictment was for breaking, &c., the

house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal, and it was ruled that the words "J. W." could not be rejected as surplusage, since they were sensible and material, it being material to lay truly the property in the goods, without words the description of the offence being incomplete. *Jenks's* 2 *East*, *P. C.* 514.

Descriptive averments—capacity in which the offence is committed.] Where a party is charged with having committed the offence in two capacities, it would seem that proof of his employment in either is sufficient. Where a party was indicted in the first and third counts, as "a person employed in sorting and charging letters in the post-office," and it appeared that he was only a sorter and not a charger of letters, the judges were inclined to think that he might have been convicted on these counts by a special finding, that he was a sorter only. *Shaw's case*, 2 *East*, *P. C.* 580; see *post*, *tit. Post-office.*

Descriptive averments—the mode of committing offences.] In general the descriptive averments of the *mode in which an offence has been committed*, do not require to be strictly proved, if, in substance, the evidence supports the allegation. Thus, in murder, it is always sufficient, if the mode of death proved agree in substance with that charged. 1 *Russ.* 466; 1 *East*, *P. C.* 341.

Where the prisoner was indicted for administering to one H. M. G., a single woman, divers large quantities of a certain shrub called savin, with intent to procure the miscarriage of the said H. M. G.; and it appeared that the prisoner had prepared the medicine by pouring boiling water over the leaves of a shrub, a process which the medical witnesses stated was an *infusion*, and not a *decoction*, Lawrence, J., overruled an objection taken on this ground. He said that infusion and decoction were *ejusdem generis*, and that the question was, whether the prisoner administered any matter or thing with intent to procure abortion. *Anon.* 3 *Campb.* 74. And see *post*, *Malicious Injuries*, and *Murder*.

So also with regard to the person by whom the offence is committed, it is sufficient to charge him with that which is the legal effect of the act which he has committed. Therefore, where an indictment charges that A. gave the mortal stroke, and that B. and C. were present aiding and abetting, if it appeared in evidence that B. was the person who gave the stroke, and that A. and C. were present aiding and abetting, they may all be found guilty of murder or manslaughter, at common law, as circumstances may vary the case. The identity of the person supposed to have given the stroke, is but a circumstance, and in this case a very immaterial one,—the stroke of one being in consideration of law the stroke of all. The person giving the stroke is no more than the hand or instrument by which the others strike. *Foster*, 351; 1 *Hale*, *P. C.* 437, 463; 2 *Id.* 344, 345.

Descriptive averments—what are not material.] The general rule with regard to immaterial averment has been thus stated. If an averment may be entirely ommitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. *Phill. Ev.*, 506, 1 *vol.* 9*th ed.* Therefore, where the name of a person

or a place is unnecessarily introduced, it need not be proved. Thus where the prisoner was indicted for robbing another *in a field near* the highway, and the jury found that he was guilty of robbing, but not near the highway, the variance was held to be immaterial. *Wardle's case*, 2 *East, P. C.* 785; *vide ante*, p. 102.

Averments as to time.] Although, before the passing of the 14 & 15 Vict. c. 100, an indictment not alleging any time at which the offence was committed, was bad, *Hawk. P. C. b.* 2, *c.* 25, yet it was not necessary to prove the time as laid, unless that particular time was material. *Phill. Ev.* 514, 1 *vol.* 9*th ed.* Thus even in treason, if the overt acts were laid on one certain day, evidence of them *after* that day was admissible. *Townley's case*, *Foster*, 8. So on an indictment for a misdemeanor, containing several counts, alleging several misdemeanors of the same kind on the same day, the prosecutor might give evidence of such misdemeanors on different days. *Levy's case*, 2 *Stark. N. P.* 458. And now, by the 24th sec. of the 14 & 15 Vict. c. 100, it is enacted, "that no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, &c., nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened."

Where, however, time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed in the night time, although the day on which the offence is charged to have been committed is immaterial. So where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. *Brown's case*, *M. & M.* 160.

Averments as to place.] In general, on the trial of offences which are not local in their nature, it is sufficient to prove that the offence was committed in the county in which it is laid to have been committed, and a mistake in the particular place in which an offence is laid, will not be material. *Hawk, P. C. b.* 2, *c.* 25, *s.* 84; *Phill. Ev.* 515, 1 *vol.* 9*th ed.*; 2 *Russ. by Greaves*, 800. Now, by the 23rd sec. of 14 & 15 Vict. c. 100, it is enacted that "it shall not be necessary to state any venue in the body of any indictment; but the country, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment: provided that in cases where local description is, or hereafter shall be required, such description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate, shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." And by section 24, no indictment for any offence shall be held insufficient "for want of a proper perfect venue."

In some particular cases it is necessary to prove the parish or place named in the indictment. Thus as in an indictment against a par[ish] for not repairing a highway, the situation of the highway within

parish is a material averment, see 2 *Stark. C. P.* 693 (*n*), it must be proved as laid. So if the statute upon which the indictment is framed, gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *Archb. C. P.* 97, *9th ed.*; 2 *Russ. by Greaves* 800; *Glossop's case*, 4 *B. & A.* 616.

So where the offence is in its nature local, the name of the parish or place must be correctly stated in the indictment, and proved as laid, as for instance, on an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like.

Where an injury is partly local and partly transitory, and a precise local description is given, the local description becomes descriptive of the transitory injury, and should be proved as laid. 3 *Stark. Ev.* 1571, *citing Cranage's case*, *Salk.* 385; 2 *Russ.* 717. So where the name of a place is mentioned, not as matter of venue, but of local description, it should be proved as laid, although it need not have been stated. Thus where an indictment (under the repealed stat. 57 Geo. 3, c. 90) charged the defendant with being found armed, with intent to destroy game in a certain wood called the Old Walk, in the occupation of J. J., and it appeared in evidence that the wood had always been called the Long Walk, and never the Old Walk, the judges held the variance fatal. *Owen's case* 1 *Moo. C. C.* 118.

If a place mentioned in pleading be stated as part of the description of a written instrument, or is to be proved by matter of record, any the slightest variance between the place as stated and that appearing from the written instrument or record when produced, was formerly fatal; see *Pitt* v. *Green*, 9 *East*, 188; *Pool* v. *Court*, 4 *Taunt.* 700; *Goodtitle* v. *Walker*, *Id.* 761; *Morgan* v. *Edwards*, 6 *Taunt.* 394; *Goodtitle* v. *Stamminman*, 2 *Camph.* 274; *Archb. Cr. P.* 98, *9th ed.* But now any such variance between the statement in the indictment and the evidence offered in proof thereof not material to the merits of the case, may be amended at the trial; 9 Geo. iv. c. 15; 14 & 15 Vict. c. 100 s. 1; see *post*, p. 107.

Averments as to value.] In general, it is not necessary to prove the value of the property stolen or injured to be the same as that laid in the indictment, though formerly the distinction between grand and petty larceny depended upon the value of the property stolen; yet as that distinction is now abolished by the 7 & 8 Geo. 4. c. 28, the value has become immaterial, except in those cases where by statute the stealing of property to a certain value enhances the punishment, as by the 7 & 8 Geo. 4. c. 29, s. 12, stealing in any dwelling-house, any chattel, &c., to the value of five pounds. So the value is material in an indictment on the stat. 5 & 6 Vict. c. 122, s. 32, against a bankrupt for removing, concealing, or embezzling any part of his estate to the value of 10*l.* or upwards. On an indictment against a bankrupt under the former statute, it was held that the value being essential to constitute an offence, and being ascribed to many articles collectively, the offence must be made out as to every one of those articles, for the grand jury had only ascribed that value to all the articles *collectively*. *Forsyth's case*, *Russ. & Ry.* 274.

The 14 & 15 Vic. c. 100, s. 24, expressly enacts, "that no indictment for any offence shall be held insufficient, for want of the statement of the value or price of any matter or thing, in the amount of damage, injury, or spoil, in any case where the value or price or the amount of damage, injury, or spoil, is not of the essence of the offence."

Amendment of variances in setting out written documents.] By the 9 Geo. 4, c. 15, E. & I., after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," it is enacted, "that it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or *in any indictment or information for any misdemeanor*, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such court or judge shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

In what cases allowed.] It will be seen that the above act does not extend to felonies, and that its powers in criminal cases are limited to courts of oyer and terminer and general gaol delivery. This statute has been held to apply only to cases in which a written instrument is professed to be set out, *Ryder* v. *Malbon*, 3 *C. & P.* 594; and to mere verbal alterations, and not to omissions which alter the effect of the part set out, *Rutherford* v. *Evans*, 4 *C. & P.* 79. In *Jelf* v. *Oriel*, 4 *C. & P.* 22, Lord Tenterden, C. J., refused an amendment, on the ground that no variance would have occurred, had common care been taken in setting forth the instrument; but as Mr. Phillips remarks, "that to prevent the failure of justice through such carelessness or ignorance, was one of the objects of the legislature in passing the act." 1 *Phill. Ev.* 517, 9*th ed.* It has been held in two cases of perjury, that amendments under this statute should be made very sparingly in criminal cases. See *Cook's case*, 7 *C. & P.* 559; and *Hewin's case*, 9 *C. & P.* 786; also *Christian's case*, 1 *Car. & M.* 388; *post*, *tit. Perjury*.

11 & 12 *Vict. c.* 46, *s.* 4.] By the 11 & 12 Vict. c. 46, s. 4, the provisions of the 9 Geo. 4. c. 15, which, as we have seen, applied to misdemeanors only, are extended to all other criminal cases the subject of an indictment or information, that section enacting "that it shall and may be lawful for any court of oyer or terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment in information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed

in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

14 & 15 Vict. c. 100 s. 1.] By the 14 & 15 Vict. c. 100 s. 1, after reciting that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and that such technical strictures may safely be relaxed in many instances so as to insure the punishment of the guilty, without depriving the accused of any just means of defence, and that a failure of justice often takes place on the trial of persons charged *with felony and misdemeanor*, by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence," it is enacted that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name and surname, or both christian name and surname or other description whatsoever or of any persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment wherein such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after such amendment the trial shall proceed whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

In *Frost's case*, 1 *Dears, C. C. R.* 427; *S. C.*, 24 *L. J. M.* C. 61, the prisoners were charged in an indictment with having by night in pursuit of game entered the lands of George William Frederick Charles Duke of Cambridge; on the trial a witness proved that George William were two of the duke's christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment, by striking out the names "Frederick Charles." This the court refused, and left the case to the jury, who being satisfied as to the identity of the duke, convicted the prisoners. On a case reserved, the Court of Criminal appeal quashed the conviction. Parke, B. said, "The court of quarter

sessions have a power of amending given them by the statute 14 & 15 Vict. c. 100, s. 1; but they have a discretion, they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us whether they ought to have done so, it is clear that upon the evidence before them they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend, had the amendment asked for, been to strike out all the christian names of the Duke of Cambridge. The indictment described the duke as George William Frederick Charles Duke of Cambridge. According to the usual rule the prosecutor must prove all matter of description alleged, though it was not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of Duke of Cambridge, and to have omitted all the christian names."

WITNESSES.

THE NUMBER REQUISITE, ATTENDANCE, REMUNERATION, AND PROTECTION OF WITNESSES.

The number of witnesses requisite.] At common law one witness was sufficient in all cases (with the exception of perjury), both before the grand jury and at the trial; 2 *Hawk. c.* 46, *s.* 2; *Fost.* 233.

But by the statutes relating to high treason (1 Ed. 6, c. 12, s. 22; 5 & 6 Ed. 6, c. 11, s. 12; 7 & 8 Wm. 3, c. 3, s. 2), two witnesses are required both before the grand jury and at the trial, to the same overt act, or one witness to one overt act, and another witness to another overt act of the same species of treason, unless the defendant shall willingly, without violence, confess the same. But a collateral fact may be proved by one witness, *Fost.* 242; as that the defendant is a natural born subject. *Vaughan's case*, 5 *St. Tr.* 29. Where the overt act alleged is the assassination of the king, or any direct attempt against his life or person one witness is sufficient, 39 & 40 Geo. 3, c. 93. In misprision of treason there must also be two witnesses unless the defendant confesses the offence, 1 Ed. 6, c. 12, s. 22.

So on an indictment for perjury two witnesses are requisite. See *post, tit. Perjury.*

But in all other cases one witness is sufficient, and a prisoner may be legally convicted on the uncorroborated testimony of an accomplice, although the practice is to require his evidence to be confirmed. See *post, tit. Admissibility of Accomplices.*

Mode of compelling the attendance of witnesses—recognizance.] There are two modes of compelling the attendance of witnesses; first by recognizance, secondly by subpœna.

By the 11 & 12 Vict. c. 42, s. 20, the justice before whom the examination is taken has power in all cases, whether of felony or misdemeanor, to bind by recognizance the prosecutor and the wit-

nesses to appear and give evidence at the court at which the accused is to be tried. The corresponding Irish Act is the 14 & 15 Vict. c. 93, s. 13. By 7 Geo. 4, c. 64, s. 3, the justice or justices have similar powers to bind by recognizance where the offender is charged with a misdemeanor, or suspicion thereof. By s. 4, coroners have the like authority, in cases of murder or manslaughter, to bind by recognizance persons to prosecute or give evidence.

If a witness, examined before a justice of the peace, refuses to be bound over, he may be committed. 2 *Hale, P. C.* 284. See *Ashton's case*, 7 *Q. B.* 169. But where the witness cannot find sureties, the magistrate ought to take his own recognizance, and it would be illegal to commit the witness. *Per Graham, B., Bodmin Sum. Ass.* 1827; 2 *Stark. Ev.* 82, 2*d ed.* Per Lord Denman in *Evans* v. *Rees*, 12 *A. & E.* 59. Where the witness was a married woman, and therefore incapable of entering into a recognizance, it was held that the magistrate was justified in committing her on her refusal to appear to give evidence, or to find sureties for her appearance to give evidence. *Bennett* v. *Watson*, 3 *M. & S.* 1. It has been held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes to prosecute for felony. *Ex parte Williams*, 13 Price, 670. Formerly, where a person had entered into a recognizance to prosecute or give evidence, and did not appear, such recognizance was, as a matter of course, estreated; but now, in such cases, by the 7 Geo. 4, c. 64, s. 31, such recognizances are not to be estreated without the written order of the judge, &c., who shall have attended the court, who shall make an order touching the estreating or putting in process of such recognizance.

Subpœna.] Where a witness has not been bound by recognizance to appear, he may be compelled to do so by *subpœna.* This process is issued by the clerk of the peace at sessions, or by the clerk of assize at the assizes, or it may be issued out of the Crown Office. The latter is the most prudent course, as it affords the most facilities for obtaining an attachment in case of a refusal to attend, and may be served out of the jurisdiction of an inferior court. 1 *Chitty, C. L.* 608; 2 *Russ. by Greaves*, 945; *King's case*, 8 *T. R.* 585. By the 45 Geo. 3, c. 92, s. 3, the service of a *subpœna* on a witness in any part of the United Kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to appear. Where there are writings or documents in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum*, directing the witness to bring with him into court the documents in question, is added to the writ of *subpœna.* If the documents are in the possession of the party or his attorney, a notice to produce must be given. Where the documents are in the possession of the prosecutor, and the prisoner is desirous of having them produced upon the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpœna duces tecum*, and not to rely on a notice to produce, since it may be a question whether a prosecutor is so far a party to the proceeding as to be effected by a notice to produce.

The *subpœna duces tecum*, is compulsory on the witness, and though it is a question for the decision of the presiding judge, whether the witness in court should produce the documents required, yet he ought to be prepared to produce them, if the judge be of that opinion. *Amey* v. *Long*, 9 *East*, 473; *R.* v. *Greenway*, 7 *Q. B.* 126. It is

no excuse for not producing a document, that it does not belong to the witness, provided it be in his possession. *Corsen* v. *Dubois*, *Holt, N. P. C.* 239. But the court will excuse the production if the disclosure would subject the party to a criminal charge or penalty. *Whitaker* v. *Izod*, 2 *Taunt.* 115. Or involve a breach of professional confidence if he be an attorney. *Harris* v. *Hill*, 3 *Stark. N. P.* 140. So neither a party nor his attorney will be compelled to produce his title deeds. *Pickering* v. *Noyes*, 1 *B. & C.* 263; *see post.* And the possession of a steward is the possession of his employer. *Lord Falmouth* v. *Moss*, 11 *Price*, 455. So a clerk in a public office cannot be compelled to bring official papers without the permission of the head of the office. *Austin* v. *Evans*, 2 *M. & G.* 430.

Where the production is excused, secondary evidence may be given of the deed. *Marston* v. *Downes*, *ante*, *p.* 8.

A person supœnaed merely to produce a document, need not be sworn; *Perry* v. *Gibson*, 1 *A. & E.* 48; and if sworn by mistake, is not liable to be cross-examined by the opposite party; *Rush* v. *Smyth*, 4 *Tyrw.* 675; 1 *Cr., M. & R.* 191. See further, *post*, *Examination of Witnesses.*

A defendant who has suffered judgment to go by default, is a competent witness to produce a deed on behalf of another defendant. *Colley* v. *Smith*, 4 *Bing. New Cases*, 285.

The prosecutor ought not to include more than four persons in one subpœna. *Doe* v. *Andrews*, *Cowp.* 845: *Tidd.* 855.

A subpœna requiring the party to attend a trial on the commission day extends to the whole assizes which, by fiction of law, are supposed to last but one day. *Scholes* v. *Hinton*, 10 *M. & W.* 15.

If the party whose attendance is required, be a married woman, the service should be upon her personally. *Goodwin* v. *West*, *Cro. Car.* 522; 2 *Phill. Ev.* 373, *9th ed.*

The witness must be personally served, by leaving with him a copy of the *subpœna*, or a *ticket* which contains the substance of the writ. 2 *Phill. Ev.* 373, *9th ed.*; 2 *Russ. by Greaves*, 945; 1 *Stark. Ev.* 77, *2d ed.*; *Maddeson* v. *Shore*, 5 *Mod.* 355. Where a copy only is served, the original must be shown to the witness, whether he require it or not, otherwise he cannot be attached. *Wadsworth* v. *Marshall*, 3 *Tyrw.* 228; 1 *C. & M.* 87. It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in London, requiring him to attend the sittings at Westminster, in the course of the same evening, has been held to be too short. *Hammond* v. *Stewart*, 1 *Str.* 510; 2 *Tidd*, 856, *8th ed.*

In order to provide for the appearance of persons to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom, it is enacted by the 45 Geo. 3, c. 92, ss. 3 & 4, U. K. that the service of a writ of subpœna in any one of the parts of the United Kingdom, shall be as effectual to compel the appearance of any person to answer or give evidence in any criminal prosecution in any other of the parts of the United Kingdom, as if the process had been served in that part where the person is required to appear. And if the person required to attend does not appear, the court out of which the process issued may transmit a certificate of the default, in the manner specified in the act; (*vide post*, p. 114) and the courts to which the certificate is transmitted may punish the person for his default, as if he had refused to appear to process issuing out of that court, provided it appear that a reasonable and sufficient sum of money to defray the expenses

of coming and attending to give evidence, and of returning, was tendered to the person making default, at the time when the subpœna was served upon him.

In a criminal case a person who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpœnaed. An indictment for stopping up a way is a criminal case for this purpose. *Per Littledale, J.*, *Sadler's case*, 4 *C. & P.* 218. So a witness being sworn, and having in court a document in his possession, is bound to produce it if required, though he have not received any notice to produce, nor been served with a *subpœna duces tecum*. *Dwyer* v. *Collins*, 7 *Exch. R.* 639, *S. C.* 21 *L. J. Ex.* 225.

Mode of compelling the attendance of witnesses—subpœna for prisoner.] In cases of misdemeanor, the defendant at common law was entitled to a writ of subpœna, but it was otherwise in capital cases, in which the party was compelled to obtain a special order of the court. 4 *Blac. Com.* 359. If the attendance of the witness was procured he was not allowed to be sworn. But by the 7 Wm. 3, c. 3, s. 7, all persons indicted for high treason, whereby corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them. And by the 1 Anne, st. 1, c. 9, all witnesses on behalf of a prisoner, for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury. Since that statute the process of subpœna is allowed to prisoners in cases of felony. 2 *Hawk. P. C. c.* 46, *s.* 172. A witness who refuses, after having been subpœnaed to attend, to give evidence for a prisoner, is liable to an attachment in the same manner as if subpœnaed for the prosecution. 1 *Stark. Ev.* 85, *2d ed.*

Mode of compelling the attendance of witnesses—habeas corpus ad testificandum.] Where a person required as a witness is in custody, or under the duress of some third person, as a sailor on board of a ship of war, so as to prevent his attendance, the mode of compelling is to issue a *habeas corpus ad testificandum*. For this purpose application must be made to the court before which the prisoner is to be tried, or to a judge, upon an affidavit, stating that the party is a material witness, and willing to attend. *R.* v. *Roddam*, *Cowp.* 672; 2 *Phill. Ev.* 374, *9th ed.*; 1 *Stark. Ev.* 80, *2d ed.* The court will then, if they think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus*. *Burbage's case*, 3 *Burr.* 1440; 2 *Phill. Ev.* 375, *9th ed.*; which is then sued out signed and sealed. *Tidd's Prac.* 809.

Formerly, it was doubted whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts than those at Westminster; but by the 43 Geo. 3, c. 140, a judge of the King's Bench or Commons Pleas, or a baron of the Exchequer, may, at his discretion, award a writ of *habeas corpus ad testificandum*, for bringing any prisoner detained in any gaol in England before a court martial, or before commissioners of bankruptcy, commissioners for auditing the public accounts, or other commissioners, acting by virtue of any royal commission or warrant.

By the 44 Geo. 3, c. 102, U. K. the judges of the King's Bench,

or Common Pleas, or barons of the Exchequer in England or Ireland, or the justices of oyer and terminer, or gaol delivery, (being such judge or baron) have power to award writs of *habeas corpus*, for bringing prisoners, detained in gaol, before such courts, or any sitting at *nisi prius*, or before any court of record in the said parts of the said United Kingdom, to be there examined as witnesses, and to testify the truth before such courts, or before any grand, petit, or other jury, in any cause or matter, civil or criminal, which shall be depending, or to be inquired into, or determined, in any of the said courts.

The application under this statute ought to be to a judge out of court. *Gordon's case*, 2 *M. & S.* 582.

The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable expenses. 2 *Phill. Ev.* 375, *9th ed.*; 1 *Stark. Ev.* 81, *2d ed.* If the witness be a prisoner of war, he cannot be brought up, without an order from the Secretary of State. *Furly* v. *Newnham*, 2 *Doug.* 419.

A witness may be brought up on *habeas corpus*, from a lunatic asylum, on an affidavit that he is fit for examination, and not dangerous. *Fennel* v. *Tait*, 5 *Tyrw.* 218; 1 *Cr., M. & R.* 584, *S. C.*

It is enacted by 16 & 17 Vict. c. 30, that any Secretary of State, and any judge of the superior courts of Common Law at Westminster, may, if he think fit, "upon application by affidavit issue a warrant or order under his hand, for bringing up any prisoner or person, confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending, or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order, to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of her Majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

Mode of compelling the attendance of witnesses—consequences of neglect to obey subpœna.] Where a person, who has been duly served with a subpœna, neglects to appear in obedience to it, he is punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence upon the trial of the prisoner, and may then be set at liberty. 1 *Chitty, C. L.* 614. The party disobeying is subject to an attachment, although the cause was not called on. *Barrow* v. *Humphreys*, 3 *B. & A.* 598. It is not necessary, in order to make a witness liable for disobeying a subpœna, that the jury should have been sworn. *Mullett* v. *Hunt*, 3 *Tyrw.* 875; 1 *Cr. & M.* 752. Neither does it seem requisite that the party should have been called on his subpœna, particularly if he did not attend the court at all. *Dixon* v. *Lee*, 5 *Tyrw.* 180; 1 *Cr., M. & R.* 645; *Stretch's case*, 3 *A. & E.* 503. But in order to ground a motion for an attachment, the affidavit must state that the party was a material witness. *Tinley* v. *Porter*, 2 *M. & W.* 822; and if it appear, by

the notes of the judge at the trial, or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. *Dicas* v. *Lawson*, 5 *Tyrw.* 235; 1 *Cr., M. & R.* 934.

If the subpœna issued out of the crown office, the court of King's Bench will, upon application, grant the attachment. *King's case*, 8 *T. R.* 585. When the process is not issued out of the crown office, and it is served in one part of the United Kingdom for the appearance of witness in another part, it is enacted by 45 Geo. 3, c. 92, ss. 3, 4, U. K. that the court issuing such process may, upon proof to their satisfaction of the service of the subpœna, transmit a certificate of the default of the witness under the seal of the court, or under the hand of one of the justices thereof to the court of King's Bench if the service were in England, to the court of Justiciary if in Scotland, and to the court of King's Bench in Ireland, if in Ireland, which courts are empowered to punish the witness in the same way, as if he had disobeyed a subpœna issued out of these courts, provided the expenses have been tendered. *Vide ante*, p. 111, 112.

The above enactment extends only to cases where the process is served in one part of the United Kingdom for the appearance of the witness in another part of the same. *Brownell's case*, 1 *A. & E.* 598. Where, therefore, that is not the case, and the subpœna has not issued from the crown office, application must be made to the court out of which the process issued; for it has been decided that disobedience to a subpœna issued by a court of quarter sessions is not a contempt of the court of King's Bench. *Brownell's case, supra.* It is doubtful whether the justices in sessions have the power of proceeding against a party by attachment, and in such case the mode of punishing would, it seems, be by indictment. *Archb. Cr. Law*, 1[illegible]1, *7th ed.* Or it would seem that courts of quarter sessions may fine an individual, though absent, for a contempt in not obeying the subpœna, in like manner as it is their constant practice to fine jurors who do not attend when summoned. See *Clement's case*, 4 *B. & A.* 233. It has been held, that if a witness refuses to give evidence before a court of quarter sessions, he may be fined and imprisoned until the fine be paid. *Lord Preston's case*, 1 *Salk.* 278. A peer of the realm is bound to obey a subpœna, and is punishable in the same manner as any other subject for disobedience. *Id.* A tender of his expenses need not be made to a witness in a criminal case in order to render him liable to an attachment. See *post*, p. 117.

Remuneration of witnesses.] At common law there was no mode provided for reimbursing witnesses for their expenses in criminal cases; but by the 27 Geo. 2. c. 3; 18 Geo. 3, c. 19; and 58 Geo. 3, c. 70, provision was made for this purpose in cases of felony. By the 7 Geo. 4, c. 64, the above statutes are repealed, and the expenses of witnesses in cases of misdemeanor, as well as felony, are now allowed. Sect. 22 enacts, that with regard to the expenses of prosecutions in cases of *felony*, "the court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna, to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor, of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money, as to

the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred, in attending before the examining magistrate, or magistrates, and the grand jury, *and in otherwise carrying on such prosecution;* and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bona fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money, as to the court shall seem reasonable and sufficient to reimburse such person for the expense which he or she shall *bona fide* have incurred, by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, *and also to compensate such person for trouble and loss of time, and the amount of expenses of attending before the examining magistrate or magistrates*, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attending in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned."

And with regard to *misdemeanors*, it is enacted by s. 23, "that where any prosecutor or other person shall appear before any court, on recognizance or subpœna, to prosecute, or give evidence against any person indicted for *any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, or of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subordination of perjury;* every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecution, and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as the court are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have, *bona fide*, attended the court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; *provided, that in cases of misdemeanor, the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.*"

By the 1 Vict. c. 44, where any prosecutor or other person shall appear before any court, on recognizance or subpœna, to prosecute or give evidence against any person upon any charge of having endeavoured to conceal the birth of any child (see *post, Concealing Birth of child,*) every such court is empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble

and loss of time, in the same manner as courts are now by law authorized and empowered to order the same in cases of prosecution for felony.

It seems doubtful whether the above statute (notwithstanding it does not contain a proviso similar to that in s. 23 of the 7 Geo. 4, c. 64, see *suprà*,) gives the power of ordering compensation for the expenses, trouble, and loss of time, in attending before the examining magistrate; or it merely places the offence of concealing the birth of a child on the same footing, with respect to costs, as the other misdemeanors enumerated in the 7 Geo. 4, c. 64, s. 23.

So much however of the 7 Geo. 4, c. 64, s. 3, as provides that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate, is repealed by the 14 & 15 Vict. c. 55; and the power of courts to allow expenses of prosecutions is extended by s. 2, to other midemeanors than those enumerated in the 7 Geo. 4, c. 64, s. 23, namely, "unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her; conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony." It is also enacted by s. 3, of the 14 & 15 Vict. c. 55, that in every case of assault brought before justices for summary decision, "in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is hereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony." So also the expenses of prosecutions are allowed in all cases of misdemeanor under the 14 & 15 Vict. c. 19. So in cases where a court or judge, under the 14 & 15 Vict. c. 100, has directed a witness to be prosecuted for perjury, and of offences committed under the 12 & 13 Vict. c. 76, (an act to protect women from fraudulent practices for procuring their defilement,) and of assaulting, &c. apprentices under the 14 & 15 Vict. c. 11, and of prosecutions conducted by poor-law guardians or overseers under the same statute.

The central criminal court act, 4 & 5 Wm. 4, c. 36, enacts (s. 12) that, "it shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery, to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for this act; and that every such treasurer or some known agent shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court to pay all such orders."

The Irish statutes relating to the remuneration of witnesses in cases of felony are the 55 Geo. 3, c. 91; 1 Wm. 4, c. 57, and the 6 & 7 Wm. 4, c. 116. See also *post*, *tit. Practice*.

Remuneration—witness bound to answer without tender of expenses.] The only instance in which it appears to be necessary to tender expenses to a witness in a criminal case before his examination, is where a subpœna is served on a person in one part of the United Kingdom for his appearance in another. In such case the 45 Geo. 3, c. 92, (*ante*, p. 114,) enacts, that such subpœna shall be effectual, provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying the expenses of coming, attending, and returning. It has, however, been doubted, whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpœna, and the doubt is founded upon the provision of the above statute. 1 *Chitty Cr. Law*, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether felonies or misdemeanors), are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpœna, although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. 2 *Phill. Ev.* 383, *9th ed.*; 2 *Russ. by Greaves*, 947. "It is," says Mr. Starkie, "the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid." 1 *Ev.* 83, (*a*) *2d ed.* And accordingly, at the York summer assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, "I fear I have not the power to order you your expenses;" and on asking the Bar if any one recollected an instance in point, Scarlett answered, "It is not done in criminal cases." 1 *Anon. Chetw. Burn.* 1001; 2 *Russ. by Greaves*, 948, (*a*). So on the trial of an indictment which had been removed into the King's Bench by certiorari, a witness for the defendant stated, before he was examined, that at the time he was served with the subpœna no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said, "We are of opinion that I have no authority in a criminal case, to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant; nor is the case altered by the indictment being removed by certiorari, and coming here as a civil cause." *Cooke's case*, 1 *C. & P.* 321. In *Cozen's case*, *Glouc. Spr. Ass.* 1843, 2 *Russ. by Greaves*, 948, (*a*), Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a subpœna *duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid.

Protection of witnesses from arrest.] A witness attending to give evidence, whether subpœnaed, or only having consented to attend, (*Smith* v. *Stewart*, 3 *East.* 89,) is protected from arrest *eundo, morando, et redeundo*. *Meekins* v. *Smith*, 1 *H. Bl.* 636. A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal. 1 *Phill. Ev.* 374, *9th ed.*; 1 *Stark. Ev.* 90, *2d ed.* A witness residing in London is not protected from arrest between the time of the service of the subpœna and the day appointed for the examination; but a

witness coming to town to be examined, is, as it seems, protected during the whole time he remains in town, *bona fide*, for the purpose of giving his testimony. *Gibbs* v. *Phillipson*, 1 *Russell & Mylne*, 19. It has been held, that a person subpœnaed as a witness in a criminal prosecution, tried at the King's Bench sittings, but who was committed for a contempt of court in striking the defendant, has the same privilege from arrest in returning home after his imprisonment has expired, that he would have had in returning home from the court if he had not been so committed. *Wigley's case*, 7 *C. & P.* 4. If a witness is improperly arrested, the court out of which the subpœna issued, or a judge of the court in which the case has been or is to be tried, will order him to be discharged. *Archb. Cr. Law*, 161, 9*th ed.* See 3 *Stark. N. P.* 132.

Attendance of witnesses before justices out of sessions.] Magistrates out of sessions have not, in general, any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provisions of acts of parliament. When a statute requires justices of the peace to take the examination of the persons bringing a prisoner before them on suspicion of felony, it incidentally gives them a power to examine upon oath, and to summon by their warrant any other persons who appear to be material witnesses, to come before them and give evidence. And it may be laid down as a general rule, that wherever magistrates are authorized by acts of Parliament to hear and determine, or to examine witnesses, they have incidentally a power to take the examination on oath. *Dalt. Just.* c. 6; *Lamb.* 517; 12 *Rep.* 131; 2 *Phill. Ev.* 384, 9*th ed.*

Attendance of witnesses before courts martial.] Witnesses who neglect to attend on courts martial after being duly summoned, are liable to be attached in the court of Queen's Bench, &c., as if they had neglected to attend a trial in some criminal proceeding in that court. 2 *Phill. Ev.* 384, 9*th ed.* See also 10 & 11 Vict. c. 12, s. 15; 10 & 11 Vict. c. 13, s. 17.

Attendance and expenses of medical witnesses, &c., on inquests.] By the 6 & 7 Wm. 4, c. 89, E. coroners are empowered to summon the legally qualified medical practitioner who attended the deceased during his last illness, or, if none, any legally qualified medical practitioner, in or near the place where the death happened, and to direct a *post mortem* examination. By s. 2, a majority of the jury may require the coroner to summon additional medical evidence, if the first be not satisfactory. By s. 4, no fee is to be paid for any *post mortem* examination instituted without the direction of the coroner; and by s. 5, where inquests are held on persons dying in public institutions, the medical officers, whose duty it was to attend them, are not to be entitled to remuneration. By s. 6, any medical practitioner not obeying the order of the coroner for his attendance, shall forfeit 5*l.* upon complaint made by the coroner before two justices. By the table of fees subjoined to the act each medical witness is entitled to one guinea for giving evidence at an inquest, and to two guineas for making a *post mortem* examination, and giving evidence thereon.

By the 1 Vict. c. 68, E. the justices for every county, &c., in England and Wales, and the town council of every borough having a coroner, shall at the next or some subsequent general or quarter

sessions, or at the next or some quarterly meeting of such council, cause to be made a schedule of the several fees, allowances, and disbursements, which, on the holding of any inquest, may be lawfully paid and made by the coroner holding such inquest (other than the fees payable to medical witnesses); and whenever any inquest shall be holden, the coroner shall immediately after the termination of the proceedings advance and pay all expenses, not exceeding the sums set forth in the said schedule: provided that until such schedule shall have been made, the coroner shall pay at his discretion all reasonable expenses of every inquest. By s. 2, coroners are also to pay the medical witnesses. By s. 3, coroners of counties, &c., are, within four months after every inquest, to lay their accounts before the sessions, and coroners of boroughs to lay theirs before the town council, and are to be respectively paid out of the county rates, or the borough fund.

The remuneration of medical witnesses on inquests in Ireland is regulated by the 10 Geo. 4, c. 37; 6 & 7 Wm. 4, c. 116, and the 1 & 2 Vict. c. 34.

INCOMPETENCY FROM WANT OF UNDERSTANDING.

It is for the court to decide upon the competency, *i. e.* the admissibility of witnesses, and for the jury to determine their credibility. It is the province of the former to judge whether there be *any* evidence; of the latter whether there be *sufficient* evidence. *Dougl.* 375, *B. N. P.* 297; *Rosc. N. P. Ev.* 103, *5th ed.*

Infants.] It is said by Gilbert, C. B.; that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence, but that the reason and sense of their evidence are to appear from the questions propounded to them, and their answers. *Gilb. Ev.* 144. At one time their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten. *Traver's case*, 2 *Str.* 700; 1 *Hale, P. C.* 302; 2 *Hale, P. C.* 278; 1 *Phill. Ev.* 9*th ed.* But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. 1 *Phill. Ev.* 4, 9*th ed.* In *Brazier's case*, 1 *East, P. C.* 443; 1 *Leach*, 199, *S. C.*, Blackstone, Nares, Eyre, and Buller, JJ., were of opinion that the evidence of a child five years of age would have been admissible, if she had appeared on examination to be capable of distinguishing between good and evil. But others of the judges, particularly Gould and Willes, JJ., held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence, or one of an inferior nature. According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may, from defect of religious instruction, be wholly unable to give any account of the nature of an oath, or of the consequences of falsehood. 1 *Phill. Ev.* 5, 9*th ed.* In a recent case of trial for murder, where it appeared that a girl eight years old, up to the time of the deceased's death, was totally ignorant of religion, but subsequently she had received some

instruction as to the nature and obligation of an oath, but at the trial seemed to have no real understanding on the subject of religion, or a future state, Patteson, J., would not allow her to be sworn, observing, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances, to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." *Williams's case*, 7 *C. & P.* 320. Mr. Pitt Taylor observes upon this case, (*Ev.* 1077, *2nd ed.*) "Perhaps the language which the learned judge is reported to have used was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child, even when offered as a witness, had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that at the time when she was called upon to give her evidence she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly in Ireland, it has been held that even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness." *R.* v. *Milton, Ir. Cir. Rep.* 61, *per Doherty, C. J.* See also *Nicholas's case, C. & K.* 246, *post*, *Rape.*

Where a case depends upon the testimony of an infant, it is usual for the court to examine him as to his competency to take an oath, previously to his going before the grand jury, and if found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. 1 *Stark. Ev.* 94, *2d ed.* This was done by Rooke, J., in the case of an indictment for a rape, and approved of by all the judges. 1 *Leach*, 430, (*n*); 2 *Bac. Ab. by Gwill.* 577, (*n.*) An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events, before the trial has commenced, for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should direct an acquittal. 1 *Phill. Ev.* 5, *9th ed.*, citing *Wade's case, post, p.* 125. There the witness was an adult, but the principle seems to apply equally to the case of a child. If a child is, from want of understanding, incapable of giving evidence upon oath, proof of its declarations is inadmissible. *Tucker's case*, 1808, *MS.*; 1 *Phill. Ev.* 6, *9th ed. Anon. Lord Raym. cited* 1 *Atk.* 29.

It is said by Blackstone, that "where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and

circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion." 4 *Com.* 214. In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given. 1 *Phill. Ev.* 6, *9th ed.*

It may be observed, the preliminary inquiry usually made for ascertaining their competency is not always of the most satisfactory nature, and sometimes is of such a description that merely by a very slight practising of the memory a child might be made to appear competent and qualified as a witness. The inquiry is commonly confined to the ascertaining of the fact whether a child has a conception of Divine punishment, being a consequence of falsehood, it seldom extends so far as to ascertain the child's nature of an oath, and scarcely ever relates to the legal punishment of perjury. Independently of the sanction of an oath the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons. What is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive. 1 *Phill. Ev.* 6, *9th ed.*

Deaf and dumb.] It was formerly held that a person born deaf and dumb was, *primâ facie*, in contemplation of law an idiot. *Steel's case*, 1 *Lea. C. C.* 452; but this presumption has been disputed by Wood, V. C., in *Harrod* v. *Harrod*, 1 *Kay & J.* 9. If it appear that such person has the use of his understanding, he is criminally answerable for his acts; 1 *Hale, P. C.* 37, and is also competent as a witness. Thus where a man deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness, "the questions and demands made by the court to the witness, and the answers made to them." The sister stated, that for a series of years she and her brother had been enabled to understand one another by means of certain arbitrary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. *Ruston's case*, 1 *Leach*, 408. So in Scotland, upon a trial for rape, the woman, who was deaf and dumb, but had been instructed by teachers, by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined. *Martin's case*, 1823, *Alison's Prac. Crim. Law of Scotl.* 486.

Idiots and Lunatics.] Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it, as to render it unsafe to trust to their testimony, are incompetent witnesses.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals, *Co. Litt.* 247; *Bac.*

Ab. Idiot (*A.* 1.), and cannot be received as a witness. *Com. Dig. Testm.* (*A.* 1.)

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness, *in lucidis intervallis.* *Com. Dig. Testm.* (*A.* 1.) He must of course have been in possession of his intellect at the time of the event, to which he testifies, as well as at the time of examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of imagination for the events he has witnessed. *Alison's Prac. C. P. of Scotl.* 436. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject (not touching the matter in question), and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind.

Where a lunatic is tendered as a witness, it is for the judge to determine whether he shall be admitted, and if, upon his examination upon the *voir dire*, he exhibits a knowledge of the religious nature of an oath, it is a ground for his admission. It is for the jury to judge of the credit that is to be given to his testimony. *Hill's case*, 2 *Den. C. C. R.* 254.

INCOMPETENCY FROM WANT OF RELIGIOUS PRINCIPLE.

General rules.] It is an established rule that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath. This rule is laid down as an acknowledged proposition by some of our earliest writers; *Sheppard's Abridg. Tryal;* and it appears to be of universal application, except in the few cases in which a solemn affirmation has been allowed by statute (see *post*) in lieu of an oath. No exemption from this obligation can be claimed in consequence of the rank or station of a witness. A peer cannot give evidence without being sworn. *Lord Shaftesbury* v. *L. Digby*, 3 *Keb.* 631; *Lord Preston's case* 1 *Salk.* 278; and the same appears to be the case in regard to the king himself; 2 *Rol. Abr.* 686; *Omichund* v. *Barker*, *Willes' Rep.* 550. The rule also holds even in the case of a judge; *Kel.* 12; or juryman; *Bennett* v. *Hundred of Hertford*, *Sty.* 233; *Fitzjames* v. *Moys*, 1 *Sid.* 133; *Kitchen* v. *Manwaring*, *cited Andr.* 321; 7 *C. & P.* 648; who happens to be cognisant of any fact material to be communicated in the course of a trial. 1 *Phill. Ev.* 7, 9*th ed.* An examination on oath implies that a witness should go through a ceremony of a particular import, and also that he should acknowledge the accuracy of that ceremony to speak the truth. 1 *Phill. Ev.* 8, 9*th ed.* It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and falsehood punished. *Id.* 10, 9*th ed.* It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. *Ruston's case*, 1 *Leach, C. C.* 455. Atheists, therefore, and such infidels as do not possess any religion that can bind their consciences to speak the truth, are excluded from being witnesses. *Bull. N. P.* 292; *Gilb. Ev.* 129. Although it was formerly held that infidels (that is to say, persons professing some other than the Christian faith) could not be witnesses, on the ground that they were under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer; *Gilb. Ev.* 142; yet a different rule has since prevailed; and it is now well settled, since the case of *Omichund* v. *Barker*, *Willes*, 549, that those infidels who believe in a God, and that he will punish them in this world, or (as it seems) in the next, if they swear falsely, may be admitted as witnesses in this country. *Id.* p. 550.

It was said by Willes, C. J., that he was clearly of opinion that those infidels (if any such there be) who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. *Omichund* v. *Barker*, *Willes*, 549. A witness was rejected on this ground by Grose, J., at the Bedford Spring Assizes, 1789, on an indictment for murder. *Anon.* 1 *Leach*, 341 (*n*). And where a witness on the *voire dire* stated that he had heard there was a God, and believed that persons who tell lies would come to the gallows; but acknowledged that he had never learned the catechism, that he was altogether ignorant of the obligation of an oath, a future state of reward and punishment, the existence of another world, and what became of wicked people after their death; he was rejected, on the ground that a person who has no idea of the sanction which this appeal to Heaven creates, ought not to be sworn as a witness. *White's case*, 1 *Leach*, 430. Upon this case it may be observed, that it seems to come within the rule with regard to competency, laid down by Willes, C. J., in *Omichund* v. *Barker*, *Willes*, 550, the witness believing that perjury would be punished by God in this world, and that upon this ground the testimony of the witness was admissible.

Where it appeared that the prosecutrix, in an indictment for rape, though an adult, and of sufficient intellect, had no idea of a future state of rewards and punishments, Bayley, J., discharged the jury, that the witness might have an opportunity of being instructed upon that point before the next assizes; but referred the question to the twelve judges, who thought the discharge of the jury improper, and that the prisoner ought to have been acquitted. *Wade's case*, 1 *Moo. C. C.* 86. A negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptised: Platt, B., held that he might be sworn, and that no further question could be asked before he was so. *Serva's case*, 2 *C. & K.* 53.

It is not yet settled by the Scotch law, whether a witness professing his disbelief in a God, and in a future state of rewards and punishments, is admissible. "When the point shall arrive," says Mr. Alison, "it is well worthy of consideration, whether there is any rational ground for such an exception;"—"whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession." *Alison, Prac. Cr. L. Scot.* 438.

Form of the oath.] The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. 1 *Phill. Ev.* 8, *9th ed.* The form of oaths, under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain to compel a man to swear by a God in whom he does not believe, and whom he therefore does not reverence. *Puffend. b.* 4, *c.* 2, *s.* 4. The rule of our law therefore is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences. *Phill. Ev.* 9, *9th ed. Per* Alderson, B., in *Miller* v. *Salomons*, 7 *Ex. R.* 534, 535; and *per* Pollock, C. B. *id.* 558. A

Jew consequently is sworn upon the Pentateuch, with his head covered. 2 *Hale, P. C.* 279; *Omichund* v. *Barker*, *Willes*, 543. But a Jew who stated that he professed Christianity, but had never been baptised, nor even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. *Gilham's case*, 1 *Esp.* 285. A witness who stated that he believed both the Old and New Testament to be the word of God, yet as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be sworn. *Edmonds* v. *Rowe*, *Ry. & Moo. N. P. C.* 77. So where a witness refused to be sworn in the usual form, by laying his right hand on the book, and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand; he was sworn accordingly. *Dalton* v. *Colt*, 2 *Sid.* 6; *Willes*, 553. And where on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hands to his buttons; and in reply to a question, whether he was sworn, stated that he was sworn and was under oath; it was held sufficient. *Love's case*, 5 *How. St. Tr.* 113. A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of the oath administered was, "You swear according to the custom of your country, and of the religion you profess, that the evidence, &c. &c." *Mildrone's case*, *Leach*, 412; *Mee* v. *Reid*, *Peake*, *N. P. C.* 23. Lord George Gordon, before he turned Jew, was sworn in the same manner, upon exhibiting articles of the peace in the King's Bench. *MS. M'Nally, on Ev.* 97. In Ireland it is the practice to swear Roman Catholic witnesses upon a Testament with a crucifix or cross upon it. *Id.* The following is also given as the form of a Scotch covenanter's oath: "I, A. B., do swear by God himself, as I shall answer to Him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth: So help me God." 1 *Leach*, 412 (*n*); *Walker's case*, *O. B.* 1788; *Ibid.* A Mahomedan is sworn on the Koran. The form in *Morgan's case*, 1 *Leach*, 54, was as follows: The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Bramin. *Omichund* v. *Barker*, 1 *Atk.* 21. The following is given in a recent case as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a China saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the court then, by direction of the interpreter, administered the oath in these words, which was translated by the interpreter into the Chinese language, "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." *Entrehman's case*, 1 *Carr. & M.* 248.

The 1 & 2 Vict. c. 105, U. K., enacts that "in all cases in which an oath may lawfully be and shall have been administered to any person either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any

occasion whatever, such person is bound by the oath administered, *provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding;* and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

In *James's case*, 6 *Cox, C. C.* 5, after the jury had delivered their verdict, it being discovered that one of the witnesses had not been sworn, the jury were then directed to reconsider their verdict, and to leave out of their consideration the evidence given by the unsworn witness.

Questions as to religious belief.] The only means of ascertaining the competency of a witness, with reference to religious principle, is by examining the party himself. Although an opinion formerly prevailed, that if a person tendered as a witness professed his disbelief in Christianity, see 1 *Atk.* 39, 50, he could not be received as a witness: yet it is now clearly settled, that upon an examination to try his competency with regard to religious principles, a question as to his belief in the Christian faith is inadmissible. Thus where a witness was asked whether he believed in the Holy Gospels of God, on which he had been sworn, Buller, J., said, that this was not the proper question, and asked him whether he believed in God, and the obligation of an oath, and a *future state* of rewards and punishments; and on his answering in the affirmative, he was admitted. *Taylor's case, Peake, N. P. C.* 11. It seems that it would be sufficient to inquire, whether he believed in a God who would punish falsehood either in this world, or in the next. *Willes*, 550, *ante*, p. 125. But although a witness may not be questioned as to his particular religious opinions, he may be asked, whether he considers the form of administering the oath to be such as will be binding on his conscience. The most correct and proper time for asking a witness this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the party is not to be precluded; but the witness may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative he cannot then be further asked, whether there be any other mode of swearing more binding upon his conscience. *The Queen's case*, 2 *Br. & B.* 284. So where a person who was of the Jewish persuasion, at the time of trial, and an attendant on the synagogue, was sworn on the Gospels as a Christian, the court refused a new trial on this ground; being of opinion that the oath as taken was binding on the witness, both as a religious and moral obligation; and Richardson, J., added, that if the witness had sworn falsely, he would be subject to the penalties of perjury. *Sells* v. *Hoare*, 3 *Br. & B.* 232; 7 *B. Moore*, 36, *S. C.*

Quakers and Moravians.] Quakers and Moravians, who refuse to take an oath, were formerly inadmissible witnesses in criminal cases, 2 *Russ.* 592; but now by the 9 Geo. 4, c. 32, s. 1, U. K., "every Quaker or Moravian who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affir-

mation or declaration, in the words following: 'I, A. B., being one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*] do solemnly, sincerely, and truly declare, and affirm:' which said affirmation or declaration shall be of the same force and effect in all courts of justice and other places, where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such declaration or affirmation shall be convicted of having wilfully, falsely, and corruptly affirmed or declared, any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are or shall be subject."

By the 3 & 4 Wm. 4, c. 49, U. K., Quakers and Moravians are permitted to make an affirmation or declaration, instead of taking an oath, "in all places, and for all purposes whatsoever, where an oath is or shall be required, either by the common law, or by any act of Parliament;" and any such affirmation or declaration, if false, is punishable as perjury.

Where a prosecutor, who had been a Quaker, but had seceded from the sect, and called himself an Evangelical Friend, stated that he could not affirm according to the form, either in the 9 Geo. 4, c. 32, or in the 3 & 4 Wm. 4, c. 49, and he was allowed to give evidence under a general form of affirmation; the judges were unanimously of opinion that his evidence was improperly received. *Doran's case*, 2 *Lew. C. C.* 27; 2 *Moo. C. C.* 37.

This case led to the passing of the 1 & 2 Vict. c. 77, U. K., which enacts, that any person who shall have been a Quaker or a Moravian may make solemn affirmation and declaration, in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form; and such affirmation or declaration, if false, is punishable as perjury. Every such affirmation or declaration is to be in the words following: "I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly, declare and affirm."

Separatists.] By the 3 & 4 Wm. 4, c. 82, U. K., the class or sect of dissenters called Separatists, when required upon any lawful occasion to take an oath, in any case where by law an oath is or may be required, are also allowed to make an affirmation or declaration instead, in the words following: "I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of the religious sect called Separatists, and that the taking of an oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare."

Persons excommunicated.] It was formerly considered that persons excommunicated could not be witnesses; but by the 53 Geo. 3, c. 127, s. 3, persons excommunicated shall incur no civil disabilities.

INCOMPETENCE FROM INFAMY.

This and the following title, Incompetency from Interest, have been in effect abolished by the act "for improving the law of evidence," (6 & 7 Vict. c. 85, E. & I.), but it has been thought advisable to retain the two heads in a condensed form, in order to show the state of the law up to the time of the alteration.

The statute, after reciting that "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony," enacts "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition according to the practice of the court, on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence, but that every person so offered, may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have any interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin, may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

The third section enacts, "that nothing in this act shall apply to

any suit, action, or proceeding brought or commenced before the passing of this act."

What crimes disqualified.] Previously to the late statute, where a man was convicted of certain offences, followed by judgment, the law declared that his testimony should not be received, on the ground of the infamy of character which the commission of such crimes indicated. It was once held, that where a man had undergone what was considered to be an infamous punishment, as the pillory, he was thereby rendered incompetent as a witness; but this rule was afterwards abandoned, and it was determined that it was not the nature of the punishment, but of the offence which rendered his evidence inadmissible. *Gilb. Ev.* 140, *B. N. P.; Priddle's case*, 1 *Leach*, 442. The crimes that incapacitated the party committing them from giving evidence, were treason, præmunire, *Co. Litt.* 68, felony, and every species of the *crimen falsi*, as perjury, forgery, and the like. *Gilb. Ev.* 139, *B. N. P.* 291. Petty larceny was formerly under the provisions of the 31 Geo. 3, c. 35, an exception to the rule which disqualified for conviction of felony, but when the distinction between grand and petty larceny was abolished, and the latter made subject to all the incidents of the former, (see *post, tit. Larceny*,) that exception existed no longer. Barratry, *Ford's case*, 2 *Salk.* 690, *sed vide Com. Dig. Testm.* (*A.* 4,) *contra*, 1 *Leach*, 442; and bribing a witness, to absent himself from a trial, *Clancy's case, Fost.* 208; were held to disqualify a witness. A conviction for a conspiracy does not appear, in all instances, to have that effect. In *Priddle's case*, 1 *Leach*, 442, where a person, who had been convicted of a conspiracy, was produced as a witness, Buller, J., rejected him. The nature of the conspiracy is not stated. A man convicted of a conspiracy at the suit of the king, that is, of a conspiracy to accuse another of a capital offence, was incompetent, for there the offender was to have the villanous judgment, and to lose the freedom of the law. 2 *Hale, P. C.* 277. Where the reception of an affidavit was opposed on the ground that the party (Lord Cochrane) making it had been convicted of a conspiracy to raise the public funds by false rumours, Sir W. Scott, after much consideration, decided against the objections. *Case of the Ville de Varsovie*, 2 *Dodson*, 174; see 3 *Stark, N. P. C.* 22. So where a witness, who had been convicted of the same conspiracy, was produced, Abbott, C. J., received the testimony of the witness, but reserved the point. *Crowther* v. *Hopwood*, 3 *Stark.* 21, *N. P.* 1 *Dow. & Ry. N. P. C.* 5, *S. C.* But where the party was convicted of a conspiracy to do an act tending to pervert the course of justice, as in the case of a conspiracy to bribe a person summoned to give evidence before justices, on a revenue case, the conviction rendered him incompetent. *Bushell* v. *Barrett, Ry. & Moo. N. P. C.* 434. It seems that a conviction for winning by fraud or ill practice in certain games, rendered the party incompetent; since the statute of 9 Anne, c. 14, s. 5, not only inflicted a penalty, but also enacted that he should be deemed infamous, and one of the legal consequences of infamy was incompetency to give evidence. *Phill. Ev.* 18, 8*th ed.* But a conviction for keeping a public gaming house was held by Abbott, C. J., not to disqualify. *Grant's case, Ry. & Moo. N. P. C.* 270. Outlawry in a personal action did not disqualify, but it was otherwise with regard to judgment of outlawry for treason or felony, which had the same effect as judgment after a verdict or confession. *Com. Dig. Testm.* (*A.* 4); *Celier's case, T. Raym.* 369; *Hawkins*,

P. C. b. 2, *c.* 48, *s.* 22. A person incompetent to give oral evidence in court, on the ground of infamy, was not allowed to have his affidavit read. *Walker* v. *Kearney*, 2 *Str.* 1148. Unless to defend himself against a complaint, *Id. Davis & Carter's case*, 2 *Salk.* 461. A person who had been convicted of a conspiracy, (it is not stated of what nature) was held to be entitled to make an affidavit to hold to bail. *Park* v. *Strockley*, 4 *D. & R.* 144. Where a witness, become incompetent from infamy, had, before conviction, attested an instrument, his handwriting might be proved in the same manner as if he were dead. *Jones* v. *Mason*, 1 *Stra.* 883.

In what manner the conviction must have been proved.] Where it was said that a witness is disqualified by *conviction*, a judgment of a court of competent jurisdiction was meant, and that judgment must have been proved in the ordinary way. Parol evidence could not therefore be given of it, 1 *Sid.* 51; and though the witness himself might have admitted that he was convicted of felony, this did not render him incompetent. *R.* v. *Castell Careinion*, 8 *East*, 78. So where a witness admitted himself guilty of perjury; this went to his credibility merely, and not to his competency; *Teal's case*, 11 *East*, 309; and he was not inadmissible, though he admitted that he perjured himself upon the point in question. *Id. Rands* v. *Thomas*, 5 *M. & S.* 246. It was not sufficient to give in evidence the indictment, and a verdict of guilty thereupon, without proving the judgment, for judgment might have been arrested. *Com. Dig. Testm.* (*A.* 4.) *Gilb. Ev.* 142. *Lee* v. *Gansell*, *Cowp.* 8. The record of the judgment therefore must have been produced in court; *Hawk. P. C. b.* 2, *c.* 46, *s.* 104; or an examined copy of it, as in other cases. 2 *Hale*, *P. C.* 278. It must have appeared that the party was convicted before a competent tribunal. Thus where, in order to prove a conviction at Sierra Leone, an indictment and conviction thereupon were given in evidence, Bayley, J., held it insufficient, because it did not show by what authority the indictment was found; and because it was imperfect as a record without the caption. *Cooke* v. *Maxwell*, 2 *Stark. N. P.* 183.

Competency, how restored—by suffering the punishment.] Even before the recent act, where the party convicted had suffered the punishment awarded, he was again rendered competent. The provisions on this subject, which were formerly contained in various statutes, were consolidated in the 9 Geo. 4, c. 32, which enacted, s. 3, that where any offender had been convicted of any felony, not punishable with death, and had endured the punishment to which such offender had been adjudged, for the same, the punishment so endured should have the like effects and consequences, as a pardon under the great seal, as to the felony, whereof the offender was so convicted; provided always that nothing therein contained, nor the enduring of such punishment should prevent or mitigate any punishment to which the offender might otherwise have been lawfully sentenced on a subsequent conviction for any other felony.

The 4th section enacted, that where any offender had been convicted of any such misdemeanor (except perjury or subornation of perjury,) and had endured the punishment adjudged for the same; such offender should not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any

court or proceeding, civil or criminal. Where a person, sentenced to transportation for seven years, was confined in the hulks during that period, but made his escape, twice for a few hours each time, (for which he was punished,) the judges held that these escapes, on which he was immediately brought back and served out the remainder of his term, did not prevent him regaining his competency. *Badcock's case, Russ. & Ry.* 248.

Competency, how restored—by pardon.] The competency of a person, whose evidence had been rendered inadmissible by conviction, was restored by the king's pardon, which had the effect of discharging all the consequences of the judgment. *Crosby's case*, 2 *Salk.* 689; *Lord Raym.* 39. But where the disability was not merely a *consequence* of the judgment, but was a *part* of the judgment, as in case of judgment for perjury upon the 5 Eliz., which provided that the party convicted should never be admitted to give evidence till the judgment was reversed, the king could not by his pardon restore competency, though it might have been restored by act of parliament. *Ford's case*, 2 *Salk.* 691; *Gilb. Ev.* 141. A man convicted of perjury *at common law*, was restored to his competency by pardon. *Id. Dover* v. *Maestaer*, 5 *Esp.* 94; see *Mr. Hargrave's learned Dissertation* "*On the effect of the King's pardon of perjury.*" 2 *Jurid. Argum.* 221. At common law, it was necessary to produce the pardon under the great seal, and it was not sufficient to show it under the sign manual, or privy seal, which are only in the nature of warrants, and countermandable. *Gully's case*, 1 *Leach*, 98; *Miller's case*, 2 *W. Bl.* 797; *Earl of Warwick's case*, 5 *St. Tr.* 171, *fo. ed.* But the 7 & 8 Geo. 4, c. 28, s. 13, enacted, that where the king should extend the royal mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of the principal secretaries of state, should grant to such offender, either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, should have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon should be so granted. This statute did not apply to the case of convictions for misdemeanors. And, therefore, to restore the competency of persons so convicted, the pardon must still have been shown under the great seal. The king might extend his mercy on whatever terms he pleased, and consequently might annex to his pardon any condition that he thought fit, whether precedent or subsequent, and on the performance of that condition the validity of the pardon depended. *Hawk. P. C. b.* 2, *c.* 37, *s.* 28. It must, therefore, have been proved, that the condition had been performed.

It has been held in Scotland, (to which country the 5 & 6 Vict. c. 85, does not extend,) and it would probably be so held if the point should arise in our own courts, that a person who has been convicted by a foreign tribunal of an offence incurring infamy, and pardoned by the sovereign authority in that country, is admissible as a witness here, if the law of the foreign country allows the competency of the party to be restored in that manner. *Smith's case*, 1788, *Burnet*, 405, *Alison, Prac.* 451.

Competency, how restored—by reversal of the judgment.] If a conviction and judgment were read on the one side to show the witness

incompetent, they might have been answered on the other, by reading a reversal of the judgment upon writ of error. If the incapacity arose from an outlawry, under a charge of treason or felony, it was removed by proof of the reversal of that outlawry. If the objection was, that the witness had been attainted by an act of parliament, which subjected him to all the penalties of an attainder, unless he surrendered before a certain day (which is a kind of parliamentary outlawry), it might have been shown that the witness had surrendered conformably with the act. *Phill. Ev.* 20, *8th ed.*

INCOMPETENCY FROM INTEREST.

See *ante*, *p.* 129, the 6 & 7 Vict. c. 85, abolishing this head of disqualification, of which, however, an outline is still retained.

Incompetency from interest—nature of the interest in general.] The general rule in criminal as well as in civil cases, was that a person interested in the event was not competent. *Per cur. in Williams's case*, 9 *B. & C.* 560. But the interest must have been such as the law recognised, and the bias, arising from the witness standing in the same situation as the party by whom he was tendered, was not sufficient. *Phill. Ev.* 114, *8th ed.* Thus, if there were two actions brought against two persons for the same assault, in the action against the one the other might be a witness, because he was not interested in the event. *By Ashurst, J.*, 1 *T. R.* 301. *By Abbott, C. J.*, 5 *B. & C.* 387. Nor was a man incompetent because he was personally interested in a similar question to that upon which he was called to give evidence. Thus a person was not incompetent because he was possibly liable to be punished by an information, in the nature of a *quo warranto* for a past act, the lawfulness of which he might have supported by his testimony in another action to which he was not a party. *Gray's case, B. R. H.* 10 *Geo.* 2; 2 *Selw. N. P.* 1148, *6th ed.*

The same rule prevailed in criminal proceedings. When several persons were separately indicted for perjury in swearing to the same fact, any of them might have been before conviction a witness for the others. *Bath* v. *Montague, cit. Forbes's Rep.* 247; *Gunstone* v. *Downes, cit.* 2 *Hale, P. C.* 280; *and* 2 *Selw. N. P.* 1148, *6th ed.*

Nature of the interest—rewards.] The expectation of a benefit, not necessarily and legally flowing from the event of the proceeding, did not render a witness incompetent, as the promise of a pardon, *post.* So where a woman gave evidence against a prisoner, under the hope that his conviction would tend to procure the pardon of her husband, who had been convicted, it went to her credit only, and not to her competency. *Rudd's case*, 1 *Leach*, 127. So in prosecutions where there were rewards, although the reward could only have been the effect of the conviction, the prosecutors were competent witnesses, yet every man who came as a witness, under the idea of

having a reward on the conviction of the prisoner, might be said to have been interested in the point of property in the event of the cause. *Per cur. Ibid.* After the riots of 1780, a reward was offered by government for the apprehension and conviction of any of the rioters, and a question arose, whether persons thus interested in the conviction of the criminals were admissible witnesses against them. The twelve judges unanimously agreed that the testimony of the witnesses, who claimed and received the reward, was admissible. 1 *Leach*, 314, (*n*). It was upon the principle, that the exclusion of persons entitled to rewards, would be inconsistent with the spirit of the acts giving the rewards, and against the grounds of public policy, that their competence was virtually continued. *Per cur.* 9 *B. & C.* 556. With regard to rewards offered by private individuals, the principle upon which persons entitled to them were held competent witnesses, was said to be, that the public had an interest upon public grounds, in the testimony of any person who knew any thing as to a crime, and that nothing private individuals could do would take away the right which the public had. *Ibid.* Again, when a statute entitled a party to pardon, provided another offender were convicted on his testimony (as was formerly the case, upon the statutes 10 & 11 Wm. 3, c. 23, s. 5, and 5 Ann. c. 31, s. 4), the party so entitled was a competent witness. Where the legislature had held out *that* as a reward by way of inducement for criminals to convict and make a discovery, it would have been acting against the rules and principles of law, if they were by giving their testimony considered as interested in the event of the prosecution. *Per cur. Rudd's case*, 1 *Leach*, 161, 135.

Nature of the interest—wager.] If the witness laid a wager that he would convict the prisoner, he was still competent, though it went to his credit. *Fox's case*, 1 *Str.* 655.

Prosecutor, when competent.] As a general rule, the prosecutor, or party injured, was a competent witness in criminal prosecutions. This rule, which by some has been supposed to have been grounded upon the absence of all legal interest, and by others, upon the principle that the law would not presume, that in a public proceeding a man would be actuated by revengeful or improper motives, appears to have been grounded on reasons of public policy, which forbid the exclusion of the person whose evidence must usually have been the most material in the case. Though as a general rule a prosecutor was competent to prove the case for the prosecution, yet many instances occurred in which he might be interested in the event of the proceeding, and in those cases his testimony could be received. But although he might have an interest in the event, he might yet have been competent, either on the ground that the statute which conferred the interest, expressly or implied, recognised his competency, *vide post*, *Informers;* or by reason of some principle of public policy, which required that his evidence should be received. See *supra*, and the judgment of the court in *Williams's case*, 9 *B. & C.* 556. Upon prosecutions for robbery, the party robbed was always considered as a competent witness, although the 21 Hen. 8, c. 11 (repealed), gave him a writ of restitution for the recovery of the stolen goods upon the conviction of the offender. The reason of this, however, depended upon the words of the statute itself, which provided, that if the felon who robbed were attainted by reason *of evidence given by*

the party robbed, or owner of the money, &c., or by any other person by their procurement, the party robbed should be restored to his money, &c. *Williams's case*, 9 *B. & C.* 550, 557.

On an indictment at common law for perjury, the prosecutor was a good witness. *Broughton's case*, 2 *Str.* 1229, *overruling Ellis's case, id.* 1104, *and Whiting's case*, 1 *Salk.* 283; see 4 *Burr.* 2255, *B. N. P.* 289. But a distinction was taken between this case and that of an indictment for perjury upon the 5 Eliz. c. 9, which gave the party grieved 10*l.* (half the penalty), in which case it was said he would not have been a competent witness. *B. N. P.* 289; *Hawk. P. C. b.* 2, *c.* 46, *s.* 118; *Gilb. Ev.* 124; 2 *Stark. Ev.* 139, 2*nd ed.* It was, however, justly observed, that as in an action to recover this moiety, the party grieved would be precluded from giving the conviction in evidence, there appeared to be no objection to his competency. 2 *Russell*, 546. It must be observed also, that the statute gave the moiety to such person as shall be grieved, &c., and *would sue for the same.* See *B. & C.* 558. Although the suit for perjury in the course of which the defendant was indicted, were not at an end, the prosecutor was still a competent witness. *Boston's case*, 4 *East*, 572. In an indictment for perjury, committed in an action where the prosecutor stated that he expected the defendant would be called as a witness against him in another action which was coming off between the same parties, Lord Denman, C. J., expressed an opinion that the prosecutor was incompetent to give evidence, by reason of the interest he had in getting rid of the defendant as a witness by convicting him of perjury. *Hulme's case*, 7 *C. & P.* 8. The correctness of this opinion was questioned. *See Phill. Ev.* 64, 8*th ed. n.* (5).

It was formerly held, that the party whose signature was forged, was not a competent witness for the prosecution on an indictment for the forgery; 2 *Russ.* 601; but the 9 Geo. 4, c. 32, s. 2, enacted, that on any prosecution by indictment or information, either at common law, or by virtue of any statute, against any person, for forging any deed, writing, instrument, or other matter whatsover, or for uttering or disposing of any deed, &c., knowing the same to be forged, or for being accessory before or after the fact to any such offence, if the same were a felony; or for aiding, &c., the commission of any such offence, if the same were a misdemeanor, no person should be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person might have or be supposed to have, in respect of such deed, &c.

Some of the older cases on the subject of the competency of witnesses in criminal proceedings, were decided upon the idea that the conviction might be afterwards evidence for the witness in another proceeding; but it was afterwards settled that the record of a conviction could not be received as evidence, either at law or in equity, in favour of the party upon whose testimony the conviction was procured. *Pickersgill's case*, 4 *East*, 577 (*n*); *Boston's case*, 4 *East*, 582. See also *Smith* v. *Rummens*, 1 *Camp.* 9; *Hathaway* v. *Banow*, *ibid.* 151; *Bindon* v. *Browning*, 1 *Taunt.* 496.

Upon an indictment for usury, the prosecutor, the borrower of the money, was competent. *Sewel's case*, 7 *Mod.* 118; *Smith* v. *Prager*, 7 *T. R.* 60. On an indictment for not repairing a highway, the prosecutor was admitted as a witness, for though the court was authorized (13 Geo. 3, c. 78, s. 64, repealed by the 5 & 6 Wm. 4, c. 50, see *post*, *Highways*,) to award costs against him, in case the proceedings should appear to be vexatious, yet it would scarcely presume, in

the first instance, that his conduct had been vexatious, so as to raise an objection to his competency, especially after the finding of a bill by the grand jury. *R.* v. *Inhab. Hammersmith*, 1 *Stark.* 357, *and note, id.* 358; 1 *Russ.* 334. So upon a removal of an indictment by *certiorari*, from the sessions to the Court of King's Bench, in which case the defendant, if convicted, is by the 5 & 6 Wm. & M. c. 11, liable to pay costs to the prosecutor, the latter was still a competent witness upon a principle of public policy, because, if the act of parliament, which was designed to discourage removal of suits by *certiorari*, should have taken off the evidence of the prosecutor, it would have given the greatest encouragement to them that was possible. *Muscot's case*, 10 *Mod.* 194; 2 *Russ.* 603. Upon an indictment for a forcible entry under the 21 Jac. 1, c. 16, or 8 H. 6, c. 9, by which the justices are empowered to make restitution of the premises entered upon, the prosecutor, the tenant of the premises so entered upon, was not a competent witness, on the ground of his interest in the restitution. *Williams's case*, 9 *B. & C.* 549; *Bearan's case*, *Ry. & Moo. N. P. C.* 242. With respect to the competency of defendants in criminal prosecutions as witnesses, see *ante*, p. 134, *and post, tit. Accomplices.*

Informers, when competent.] Whether an informer, entitled by statute to the penalty or part of the penalty, upon the conviction of an offender, was a competent witness upon the prosecution of such person, depended upon the terms of the statute creating the penalty. It has been already stated, (*ante*, p. 135), that the mere fact of a reward being given to the party discovering an offender, did not incapacitate the party, if the statute giving the reward contemplated such person being a witness. And it seems to have been settled, that where a statute gave a reward, or the whole or part of a penalty to the informer, and such reward or penalty was not recoverable upon the indictment itself, but a distinct suit was necessary, then, as the conviction would not have been evidence in such suit, the testimony of the party entitled to the penalty, &c., was admissible. See *Williams's case*, 9 *B. & C.* 557. Thus upon a prosecution upon the stat. 9 Ann. c. 14, s. 5, for penalties by the loser of money at cards, he was a competent witness, the penalties being given to such person or persons as shall sue for the same by action. *Luckup's case, cited Willes*, 425, (*a*); 9 *B. & C.* 557. So on a prosecution for the penalty of 500*l.* under stat. 23 Geo. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, although the informer was entitled to a moiety of the penalty, upon suing for the same. *Johnson's case*, *Willes*, 425, (*a*); 9 *B. & C.* 551.

Where the act giving the penalty to the informer or other person, contemplated his being a witness, he was of course admissible. Such persons were, in the words of Lord Ellenborough, "made witnesses by a legislative declaration." 4 *East*, 183. By the 2 Geo. 2, c. 24, s. 8, relating to bribery at elections, any offender within the act discovering within a certain time any other offender, so that the person discovered be thereupon convicted, the discoverer not having been himself before that time convicted, shall be indemnified and discharged from all penalties and liabilities incurred under the act. This gave a parliamentary capacitation to the witness, through whom the fact was discovered, and who might otherwise at common law have been incapacitated. *Heward* v. *Shipley*, 4 *East*, 180; *Bush* v. *Ralling; Phillips* v. *Fowler, cited Sayer*, 291, 9 *B. & C.* 557. So

where upon an indictment on the 21 Geo. 3, c. 37, s. 1, for exporting machines used in the manufactures of this country, the informer, to whom the penalty (by s. 7) was to go, when not otherwise provided for, was held by Lord Kenyon to be a competent witness, his lordship observing that the objection had been long since overruled in a case in Sir J. Burrow's Reports, soon after Lord Mansfield's coming into the court, in cases of bribery. ([illegible]ling's case, *Sayer*, 289); *Teasdale's case*, 3 *Esp.* 68. But where the penalty was recoverable on the indictment itself, and the informer was not driven to a suit, and was not rendered competent by the construction of the statute, his title to the penalty gave such an interest in the event of the prosecution as would incapacitate him. Thus a conviction for deer-stealing was quashed, because the same person was both informer and witness, and entitled to a part of the penalty. *Tilly's case*, 1 *Str.* 316; *Piercy's case*, *Andr.* 18; *Blaney's case*, *id.* 240, *S. P.* So upon an information on the stat. 17 Geo. 2, c. 46, for having naval stores in possession, the informer, who was entitled to a moiety of the penalty given by the act, was rejected as incompetent by Lord Kenyon. *Blackman's case*, 1 *Esp.* 96, *sed vide post.* But where the statute gave the court power either to fine or imprison, a person who would be entitled to a portion of the fine was a competent witness. See *Cole's case*, 1 *Esp.* 169; *Peake*, 217. In many cases informers entitled to receive penalties, were, notwithstanding, made competent witnesses by the express provisions of various statutes. As for instance by the 3 & 4 Wm. 4, c. 53, s. 118, for the prevention of smuggling. So in the 32 Geo. 3, c. 56, for preventing counterfeit certificates of servants' characters, and in 33 Geo. 3, c. 75, s. 17, and 1 & 2 Vict. c. 79, s. 26, for regulating hackney coaches, similar provisions rendering the informer competent are contained. So also by the 27 Geo. 3, c. 29, the inhabitants of every parish, township, or place, should be deemed and taken to be competent witnesses for the purpose of proving the commission of any offence within the limits of such parish, &c., notwithstanding the penalty incurred by such offence, or any part thereof, was or might be given, or applicable to the poor of such parish, &c., or otherwise, for the benefit or use, or in aid or exoneration of such parish, &c. Provided always, that nothing in that act contained, should extend to any action or proceeding, in which the penalty or penalties to be recovered, shall exceed the sum of twenty pounds. See *Davis's case*, 6 *T. R.* 177. Where a penalty was imposed by statute, and the whole or part was given to the informer, who became entitled to it upon the conviction, he was an incompetent witness, unless rendered competent by the statute. *Tilley's case*, 1 *Stra.* 315; *Stone's case*, 21 *Ld. Raym.* 1545.

Inhabitants, when competent.] The rule with regard to the competency of inhabitants, was thus laid down by Chief Baron Gilbert. "The men of one county, city, hundred, town, corporation, or parish, are evidence in relation to the rights, privileges, immunities, and affairs, of such town, &c., if they are not concerned in private interest, in relation thereto, or advantaged by such rights and privileges, as they assert by their attestation. Men of a county are evidence on an indictment for not repairing a bridge, whether it be in repair or not, for they are perfectly indifferent, because it is equal to every man that the bridge, for convenience of passage, should be repaired where it is necessary, as that they should not be put to unnecessary charge; for every man, for the convenience of his own

passage, is concerned to uphold the bridge, and cannot be thought to create a useless charge, so that he is perfectly indifferent, being equally interested; but the men of a county cannot be sworn in a cause relating to the bounds of the county, in a suit depending between that and another county, carried on at the county charge, because every man is in such a case concerned to prevail in point of interest." *Gilb. Ev.* 126. Some doubt, however, existing with regard to the admissibility of the evidence of inhabitants, on indictments for not repairing decayed bridges and highways against private persons or bodies politic or corporate, the stat. 1 Ann. st. 1, c. 18, s. 13, reciting, that such witnesses had been rejected, enacted, that in all informations and indictments to be brought and tried in any of his Majesty's courts of record at Westminster, or at the assizes, or quarter sessions of the peace, the evidence of the inhabitants, being credible witnesses, or any of them, of the town, corporation, county, riding, or division in which such decayed bridge or highway lies, shall be taken and admitted in all such cases in the courts aforesaid, any custom, rule, order, or usage to the contrary, notwithstanding. The inhabitants of the hundred could not, before the stat. 8 Geo. 2, c. 16, s. 15, have been competent witnesses for the defence in an action on the (repealed) statute of Winton, *Gilb. Ev.* 127, but by the statute of Geo. 2 they were rendered competent. By the 13 Geo. 3, c. 78, s. 76, any inhabitant of any parish, township, or place, in which any offence should be committed contrary to that act, should be deemed a competent witness, notwithstanding his or her being such inhabitant. And by sect. 68, the surveyor of any parish, township, or place, should be deemed in all cases a competent witness in all matters relative to the execution of the act, notwithstanding his salary might arise in part from the forfeitures and penalties thereby inflicted. By the general rule of law the rated inhabitants of a *parish* were not competent witnesses for the defence, in an indictment for not repairing a highway. *Dict. per Lord Ellenborough*, 1 *B. & A.* 66; *Phill. Ev.* 134, *8th ed.*; 1 *Russ.* 334; 2 *Russ.* 602. Upon an indictment against the inhabitants of a *township*, for not repairing a highway, the defendants pleaded that one R. was bound *ratione tenuræ* to repair. To prove this, an inhabitant of the township was called, who was not an occupier of land there, and consequently not rated to the poor; but Lord Kenyon rejected him as being directly interested in the event of the suit, because if there should be a verdict against the defendants, the witness, as an inhabitant, would be liable to the payment of the fine; and also any inhabitant was liable to the statute duty. *R.* v. *Inhab. Wheaton Aston*, *Serjt. Williams's MSS.*; 1 *Stark. Ev.* 144, *2d ed.* But where a penalty was given to the poor of a parish, as the recovery of the penalties only went to relieve such persons as were actually rated to the relief of the poor, an inhabitant of the parish, though omitted from the rate, for the very purpose of giving evidence, was decided to be a competent witness. *R.* v. *Inhab. Kirkford*, 2 *East*, 559. So a parishioner paying rates was held to be a competent witness in an action defended by an order of vestry, directing the costs to be defrayed out of the rates, such order being illegal. *Yates* v. *Lance*, 6 *Esp.* 132. By the 54 Geo. 3, c. 107, s. 9, rated inhabitants were rendered competent witnesses (among other things) "in any matter relating to such rates or cesses." There were various contradictory decisions upon the effect of this statute, but it was held (overruling *Oxenden* v. *Palmer*, 2 *B. & Ad.* 236, and *Rex* v.

Bp. Auckland, 1 *A. & E.* 744,) that a rated inhabitant was a competent witness for his parish under the above act in an ejectment respecting parish property. *Doe* v. *Adderley*, 3 *N. & P.* 629; *Doe* v. *Bowles*, *id.* 632.

By the highway act, 4 & 5 Wm. 4, c. 50, s. 100 (repealing the 13 Geo. 3, c. 78, and other statutes) no person should be deemed incompetent to give evidence, or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings, under or by virtue of that act, by reason of being an inhabitant (which by the interpretation clause, s. 5, included any person rated to the highway rate) of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, or assistant surveyor, collector, or other officer appointed by virtue of that act. Also by the general turnpike act, 3 Geo. 4, c. 126, s. 137, any inhabitant of any parish, township, or place, in which any offence should be committed contrary to that act should not be deemed an incompetent witness by reason of being such inhabitant. And by the 4 Geo. 4, c. 95, s. 84, no person should be deemed incompetent to give evidence in any action, suit, prosecution, or other legal proceedings, &c., under or by virtue of any act for making or maintaining any turnpike road, or the 3 Geo. 4, c. 126, or that act, by reason of being a trustee or commissioner of such road, or a mortgagee or creditor of the tolls thereof, or a farmer, lessee, or collector of such tolls, or a treasurer, or clerk, or surveyor, or other officer under such act. See further *post*, *titles*, *Bridges*, *Highways*.

Bail incompetent.] In criminal as well as in civil cases, persons who had become bail were incompetent witnesses for the defence. Thus on the trial of John Hampden for a misdemeanor, Sir Henry Hobart was called as a witness for the defendant, and objected to on the ground of his being bail, and the objection was allowed; for the bail was exonerated from his recognizance on the discharge of his principal, but it was said that the bail might have been changed, in order to make him a good witness. *Hampden's case*, 3 *St. Tr.* 842, *fo. ed.*; 1 *M'Nally*, *Ev.* 59.

Interest, how removed.] Where the incompetency of a witness depended upon a pecuniary or other interest, with which he was capable of parting, it might have been removed by a release or other proper mode. Thus before the passing of the 9 Geo. 4, c. 32, (which rendered the prosecutor in cases of forgery a competent witness, *vide ante*, 136) a release from the holder of a promissory note, to the supposed drawer, in whose name it was forged, rendered the latter a competent witness to prove the forgery. *Akehurst's case*, 1 *Leach*, 150. So if the supposed obligor of a bond had been released by the supposed obligee. *Dodd's case*, 2 *East*, *P. C.* 1003; 1 *Leach*, 155. It might also have been shown that the witness, though once interested, had become competent by payment, or other matter, discharging the interest. Thus where the party, whose name was forged to a receipt, had recovered the money from the prisoner, he was held to be competent. *Well's case*, *B. N. P.* 289; 12 *Vin. Ab.* 23; 1 *Stark. Ev.* 127, *2nd ed.* If the party wishing to call an interested witness, tendered a release to him, which the witness refused, he might still be examined. *Phill. Ev.* 144, *8th ed.*; 2 *Russell*, 378. So if the witness himself tendered a release. *Bent* v. *Baker*, 3 *T. R.* 35; *Goodtitle* v. *Welford*, *Dougl.* 139.

INCOMPETENCY—HUSBAND AND WIFE.

General rule.] Husband and wife are in general incompetent witnesses, either for or against each other, on the ground partly of policy, and partly of identity of interest. The circumstance of one of the parties being called *for* or *against* the other, makes no distinction in the law. When the testimony of either is admissible *against*, it is likewise admissible *in favour of*, the other. *Serjeant's case*, *Ry. & Moo. N. P. C.* 352. And this rule of law is not affected by the recent statutes; the 14 & 15 Vict. c. 99, s. 3, and the 16 & 17 Vict. c. 83, s. 2, expressly providing that nothing therein contained shall "render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding;" and s. 3, that "they shall not be compellable to disclose communications made to each other during the marriage."

The declarations of husband and wife are subject to the same rule of exclusion as their *vivâ voce* testimony. But although neither the evidence nor the declaration of a wife are admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer, or an evasive reply, are receivable in evidence as an implied admission on his part. *Smithie's case*, 5 *C. & P.* 332; *Bartlett's case*, 7 *C. & P.* 832. So what a prisoner is overheard to say to his wife, or to himself, is evidence against him. *Simon's case*, 6 *C. & P.* 510.

Where the relation of husband and wife has once subsisted, the one is inadmissible for or against the other, even after the relation has ceased, with respect to matters which occurred during the continuance of the relation. Thus, where a woman divorced by act of parliament, and married again, was called to prove a contract by her former husband, she was rejected by Lord Alvanley. If she might be a witness, his lordship observed, in a civil proceeding, she might equally be so in a criminal proceeding: and it could never be endured, that the confidence which the law had created, whilst the parties remained in the most intimate of all relations, should be broken, whenever by the misconduct of one party the relation has been dissolved. *Monroe* v. *Twisleton*, *Peake, Ev. App.* xci. *5th ed.* Upon the authority of this case, Best, C. J., rejected the testimony of a widow called to prove a conversation between herself and her late husband. *Doker* v. *Hasler*, *Ry. & M., N. P. C.* 198; *sed vide Beveridge* v. *Minter*, 1 *C. & P.* 364, where Lord Tenterden, C. J., received the evidence.

But in *O'Connor* v. *Marjoribanks*, 4 *M. & G.* 435, the court of Common Pleas held, that it was the sounder and better rule to exclude the testimony of each respecting the other in *all* cases, according to the law laid down by Lord Alvanley in *Monroe* v. *Twisleton.*

Only extends to lawful husband and wife.] It is only where there has been a valid marriage, that the parties are excluded from giving evidence for or against each other. Therefore, on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the husband, for the marriage is void. *B. N. P.* 287; *Bac. Ab. Ev. A.* 1; 1 *East, P. C.* 469. So where a woman had married the plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead; Patteson, J., held that there was no objection to her giving evidence for the defendant. *Wells* v. *Fisher*, 1 *Moo. & R.* 99, *S. C.* 5 *C. & P.* 12. A woman who has cohabited with a man as his wife, but is not so in fact, is a competent witness for or against him. *Bathews* v. *Galindo*, 4 *Bingh.* 610.

Evidence of either admissible in collateral proceedings, although it tends to criminate the other.] It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. It was indeed, in one case, laid down as a rule, founded upon a principle of public policy, that a husband and wife are not permitted to give evidence, which may tend to criminate each other. *Per Ashurst, J., R.* v. *Cliviger*, 2 *T. R.* 268. But in a subsequent case, the court of King's Bench, after much argument, held that the rule as above stated, was too large, and that where the evidence of the wife did not directly criminate the husband, and never could be used against him, and where the judgment, founded upon such evidence, could not affect him, the evidence of the wife was admissible. *R.* v. *All Saints, Worcester*, 1 *Phill. Ev.* 72, *9th ed.*; 6 *M. & S.* 194. So also, it was held in a settlement case, that a wife was a competent witness to prove her marriage with her husband, although he had previously been examined, and proved a second marriage with another woman. Lord Tenterden, C. J., in delivering the judgment of the court, said, "In deposing to this marriage, she did not contradict any thing that he (the husband) had said. I notice this fact, but we do not mean to say that if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that point at present." *Rex* v. *Bathwick*, 2 *B. & Ad.* 639.

A wife may likewise be a witness in an action between third parties, not immediately affecting the interest of the husband, though her evidence may possibly expose him to a legal demand, as in an action between third persons, for goods sold and delivered, to prove that the goods were sold on her husband's credit, and not on the credit of the defendant. *Per King, C. J., Williams* v. *Johnson*, 1 *Str.* 204, *Bull. N. P.* 287, *S. C.* But it is settled that neither husband nor wife is competent to prove non-access in whatever form the legal proceeding may be, and whoever may be parties to it. *Rex* v. *Rooke*, 1 *Wilson*, 340; *Rex* v. *Luffe*, *East*, 203; *Rex* v.

Kea, 11 *East*, 132. Neither can either be examined as to any collateral fact for the purpose of proving non-access. *Rex* v. *Stourton*, 5 *A. & E.* 180.

Cases where husband or wife has been held incompetent.] On an indictment for a joint assault against two, it was proposed to examine the wife of one of the defendants in favour of the other, but there having been material evidence given against the husband, and it being a joint trespass, and impossible to separate the cases of the two defendants, the Chief Justice refused to let her be examined. *Frederick's case*, 2 *Str.* 1095. On a joint indictment for burglary against two, the wife of one of the prisoners has been held incompetent to prove an *alibi* for the other. Littledale, J., rejected the evidence, on the ground that it would go to show that the witness for the prosecution was mistaken as to one of the prisoners, and would thus weaken his evidence altogether, and benefit her husband. On a case reserved, the judges (except Graham, B., and Littledale, J.) thought the evidence rightly rejected. *Smith's case*, 1 *Moody*, *C. C.* 289. See also *Hood's case*, *id.* 281. So upon an indictment for a conspiracy, the wife of one of the defendants cannot be called as a witness for another defendant. *Locker's case*, 5 *Esp.* 107. Again, upon an indictment for a conspiracy against the wife of W. S. and others, for procuring W. S. to marry; Abbott, C. J., rejected W. S. when called as a witness for the prosecution. *Serjeant's case*, *Ry. & Moo. N. P. C.* 352. So where upon an indictment against Webb and three other prisoners for sheep-stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners, that the wife of one prisoner was incompetent to give evidence for or against the other prisoners, Bolland, B., held that the witness was incompetent. *Webb's case*, *Glouc. Spr. Ass.* 1830, 2 *Russ. by Grea.* 982. So where on an indictment for stealing wheat, E. was called on the part of the crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner. Taunton, J., after consulting Littledale, J., said, "We both agree in opinion that the witness is incompetent." *George Glead's case*, *Glouc. Lent Ass.* 1832, 2 *Russ. by Grea.* 983. But where A. and B. were indicted for burglary, and a part of the stolen property was found in the house of each of the prisoners, Tindal, C. J., allowed the wife of A. to be called, to prove that she took to B.'s house the property which was found there. *Sills's case*, 1 *C. & K.* 494. It seems that if the wife has been connected with the commission of the offence, she may be brought into court for the purpose of being identified. This has been decided in the Scotch law, where several prisoners were put to the bar, charged with stronthrief, it was held incompetent to adduce the wife of one against any of the others at the bar, although she was allowed to be brought into court and identified by the other witnesses, as the person who had passed one of the stolen notes. *Law's case*, *Alison's Prac. C. L. Scotl.* 533.

Smith's case, *supra*, must be understood as having been decided on its own peculiar circumstances, and not as warranting the conclusion that where prisoners set up a separate and distinct defence, the wife of one prisoner cannot in any case be a witness for

another prisoner. 1 *Phill. Ev.* 75, *9th ed.* And with reference to *Smith's case* and to *Hood's case, ante*, 143, it is observed, 2 *Russ. by Grea.* 981, n. (*o*), "The authority of these cases seems open to some doubt, as they infringe the rule that it is only where there is a *certain* interest in the result that the witness is incompetent, and the utmost that can be said is, that in such cases the evidence has a *tendency* to produce such a result. It is also a great anomaly that a witness should be competent for a prisoner, if tried separately, but incompetent for him if tried jointly with the witness's husband."

Where the husband has previously been convicted, the wife is a competent witness to prove the offence against another party. Thus, on an indictment against B. for sheep-stealing, Alderson, B., held that the wife of A., who had been previously convicted of stealing the same sheep, was a competent witness for the prosecution. The learned judge observed, that in *Thurtell's case*, Mrs. Probert was the principal witness against him after her husband was acquitted. *Williams's case*, 8 *C. & P.* 284.

It is a settled rule, that in cases of bigamy, the first and lawful wife is not a competent witness; *Grigg's case, Sir T. Raym.* 1; although the second wife is; *ante*, p. 142. The law is the same in Scotland. *Alison's Prac. Cr. L.* 463. But the propriety of this exclusion is doubted by an able text-writer. "Having once," he says, "for just and necessary reasons, admitted an exception to the general rule, in the case of a wife who has sustained a personal injury from her husband, is there any principle on which it can be held not to include that case where the injury to herself and her family is the greatest, from a desertion of them both by the head of the family? Nor is the reason of exclusion, founded on the peace of families, here of the slightest weight, but rather the reverse; for a husband who has been guilty of bigamy, has proved himself dead to all sentiments of that description, and having already deserted his first wife for another woman, he has given the clearest evidence that no farther family dissensions need be apprehended from her appearing to give evidence against him." *Alison's Prac. Cr. L.* 463. Whether or not the wife is a competent witness against her husband on a charge of treason, appears to have been doubted. In *Grigg's case, T. Raym.* 1, which was an indictment for bigamy, it is said *obiter*, that a wife could not be a witness against her husband *except in treason*: but on the other hand, it has been asserted that a wife is not bound in case of high treason, to discover her husband's treason; *Brownl. Rep.* 47; and there are many authorities to the same effect which appear to settle the point. 1 *Hale, P. C.* 301; *Hawk. P. C. b.* 2, *s.* 2, *c.* 46, *s.* 182; *Bac. Ab. Evid. A.* 1. See 2 *Stark. Ev.* 404, 2*d ed.*; 2 *Russ.* 607; 1 *Phill. Ev.* 71, 9*th ed.*

Although by the 6 Geo. 4, c. 16, s. 37, commissioners of bankrupts are authorised to summon before them the wife of any bankrupt, and to examine her for the discovery and finding out of the estate of the bankrupt concealed by her, yet she cannot be examined touching the bankruptcy of her husband. 12 *Vin. Ab.* 11; *Ex parte James*, 1 *P. Wms.* 611. Her evidence being admissible only by statute, before the commissioners, she will not be a competent witness for or against her husband, on an indictment against him for concealing his effects.

Case of personal violence.] It is quite clear that a wife is a com-

petent witness against her husband, in respect of any charge which affects her liberty or person. *Per Hullock, B. Wakefield's case*, p. 157, *Murray's ed.*; 2 *Russ.* 606. Thus in *Lord Audley's case*, who was tried as a principal in the second degree, for a rape upon his own wife; the judges resolved that though, in a civil case, the wife is not a competent witness, yet that in a criminal case of this nature, being the party grieved, upon whom the crime is committed, she is to be admitted as a witness against her husband. 3 *How. St. Tr.* 414; 1 *Hale, P. C.* 301. So on an indictment against the husband for an assault upon the wife. *Azire's case*, 1 *Str.* 633; *B. N. P.* 287. So a wife is always permitted to swear the peace against her husband, and her affidavit has been permitted to be read, on an application to the court of King's Bench, for an information against the husband, for an attempt to take her away by force, after articles of separation. *Lady Lawley's case, B. N. P.* 287. Upon an indictment under the repealed statute, 3 Hen. 7, c. 2, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*. *Fulwood's case, Cro. Car.* 488; *Brown's case*, 1 *Vent.* 243; *Naagen Swendsen's case*, 14 *How. St. Tr.* 559, 575. And she was consequently a witness *for* him. *Perry's case, coram Gibbs*, 1794; *Hawk. P. C. b.* 2, *c.* 46, *s.* 79, cited *Ry. & Moo. N. P. C.* 353. But a doubt has been entertained, whether if the woman afterwards assent to the marriage, she is capable of being a witness. In *Brown's case* (*supra*), it is said by Lord Hale, that most were of opinion that, had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband. 1 *Hale, P. C.* 302. But Mr. Justice Blackstone, in his Commentaries, has expressed a contrary opinion. 4 *Com.* 209. And the arguments of Mr. East, on the same side, appear to carry great weight with them. 1 *East, P.* 454. In a case before Mr. Baron Hullock, where the defendants were charged, in one count with a conspiracy to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and in another count, with conspiring to take her away by force being an heiress, and to marry her to one of the defendants; the learned judge was of opinion, that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself. *Wakefield's case*, 257, *Murray's ed.*; 2 *Russ.* 605; 2 *Stark. Ev.* 402 (*n*), 2*nd ed.* Upon an indictment under Lord Ellenborough's act, against a man for shooting at his wife, the latter was admitted as a witness by Mr. Baron Garrow, after consulting Holroyd, J., upon the ground of the necessity of the case, and Mr. Justice Holroyd sent Mr. Baron Garrow the case of *R.* v. *Jagger*, 1 *East, P. C.* 455, *York Assizes*, 1797, where the husband attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband, and Mr. Justice Rooke afterwards delivered the opinion of the twelve judges, that the evidence was rightly admitted. Mr. Justice Holroyd, however, said, that he thought the wife could only be admitted to prove facts, which could not be proved by any other witness. 2 *Russ.* 196.

Upon the same principle that the evidence of the wife, if living, would be received to prove a case of personal violence, her dying declarations are admissible in case of murder by her husband. *Woodcock's case*, 1 *Leach*, 500; *John's case*, *Id.* 504 (*n*); 2 *Russ.* 606. And in similar cases of personal violence, the examinations of the party (husband or wife) murdered, taken before a magistrate, pursuant to the statute, would, as it seems, be admissible against the husband or wife, where the evidence of the husband or wife, if living, would have been admissible. See *M'Nally*, *Ev.* 175.

ADMISSIBILITY OF ACCOMPLICES.

Accomplices in general.] THE evidence of persons who have been accomplices in the commission of a crime with which the prisoner stands charged, is, in general, admissible against him. This rule has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders. *Hawk. P. C. b.* 2, *c.* 46, *s.* 94. Even where the accomplice has been joined in the same indictment with the prisoner, he may still be called as a witness, before he is convicted. *Id. s.* 95. It is said that an accomplice indicted with another is an admissible evidence, *if he be not put upon his trial.* 2 *Stark. Ev.* 11, 2*nd ed.*; 2 *Russell*, 597. In strictness, however, there did not seem to be any objection formerly to the admitting of the witness at any time before conviction. "The party that is the witness," says Lord Hale, "is never indicted, because that much weakens and disparages his testimony, but possibly does not wholly take away his testimony." 1 *Hale, P. C.* 305. It is not a matter of course, to admit an accomplice to give evidence on the trial, even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made. 1 *Phill. Ev.* 28, 9*th ed.* The court usually considers, not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals and several as receivers, but no corroboration could be given as to the receivers against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. *Mellor's case, Staff. Sum. Ass.* 1833. So in *Saunders' case, Worc. Spr. Ass.* 1842, on a motion to admit an accomplice; Patteson, J., said, "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification and there is no corroboration, that will not do." And in *Salt's case, Staff. Spr. Ass.* 1843,

where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness. 2 *Russ. by Grea.* 959 (*f*).

The practice, where the testimony of an accomplice is required to prove the case before the grand jury, and he is in custody, is for the counsel for the prosecution to move that he be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential. 2 *Stark. Ev.* 11, 2*nd ed.* Where the accomplice has been joined in the indictment, and before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case, to apply to have the accomplice acquitted. *Rowland's case, Ry. & Moo. N. P. C.* 401. Where the case has proceeded against all the prisoners, but no evidence appears against one of them, the court will, in its discretion, upon the application of the prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. *Fraser's case*, 1 *M'Nally*, 56.

Where a party had been joined in the indictment, and it was intended to call him as a witness for the prosecution, it was formerly the practice to enter a *nolle prosequi* as to him. *Ward* v. *Man*, 2 *Atk.* 229. Where the defendants were indicted for a conspiracy, to persuade a witness to absent himself from the trial of a person charged with uttering base money, the attorney-general entered a *nolle prosequi*, as to two of the defendants, who were then examined for the crown, and on their evidence the others were convicted. *Ellis's case, sitt. after H. T.* 1802, 1 *M'Nal. Ev.* 55. Where on a joint indictment against two prisoners, one pleads guilty, he is a competent witness for the prosecution against the other. *R.* v. *Hinks and others*, 1 *Den. C. C. R.* 84. A. B. C. and D. were indicted together. After plea, and before they were given in charge to the jury, Williams, J., allowed D. to be removed from the dock, and examined as a witness against his associates. *Gerber's case, Temp. & M.* 647.

Principal felon.] Upon an indictment against a receiver, the principal felon may be a witness against the former. This was allowed on the repealed statute, 22 Geo. 3, c. 28, *Patram's case*, 2 *East, P. C.* 782; 1 *Leach*, 419 (*n*), *S. C.*; and in a prosecution on the 4 Geo. 1, c. 11, for taking a reward for helping to discover stolen goods. *Wild's case*, 2 *East, P. C.* 783; *Haslam's case, Id.* 702; 1 *Leach*, 418.

Accomplice—when competent for prisoner.] It is quite clear that an accomplice, not joined in the indictment, is a competent witness for the prisoner, in conjunction with whom he himself committed the crime. And even where they are severally indicted for the same offence, the one may be called for the other. *Balmore's case*, 1 *Hale, P. C.* 305; and that even after the former has been convicted, see 6 & 7 Vict. c. 15, *ante*, p. 134.

Accomplice—promise of pardon.] Although Lord Hale thought that if a man had a promise of pardon if he gave evidence against one of his confederates, this disabled his testimony, 2 *Hale, P. C.* 280; yet it was fully settled, before the 6 & 7 Vict. c. 85, that such a promise, however it might affect the credibility of the witness, would not destroy his competency. *Tonge's case, Kelynge*, 18; *Phill. Ev.* 27, 9*th. ed.*

Accomplice—effect of his evidence.] A conviction on the testimony

of an accomplice, uncorroborated, is legal. This point having been reserved in a case tried before Buller, J., the twelve judges were unanimously of opinion, that an accomplice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone, is perfectly legal. *Atwood's case*, 1 *Leach*, 464; *Durham's case*, *Id.* 478; 1 *Hale*, *P. C.* 304, 305; *Jones's case*, 2 *Camp.* 132. *Per Lord Denman*, *Hastings' case*, 7 *C. & P.* 152. *Per Alderson*, *B.*, *Wilks's case*, *Id.* 273. This rule, however, is in practice subjected to much limitation; "Judges," observes Lord Ellenborough, "in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes to." *Jones's case*, 2 *Camp.* 132. So where, on an indictment for highway robbery, an accomplice only was called, the court, though it was admitted that such evidence was legal, thought it too dangerous to permit a conviction to take place, and the prisoners were acquitted. *Jones and Davis's case*, 1 *Leach*, 479 (*n*). The practice, therefore, is for the court to direct the jury in such cases to acquit the prisoner, unless in some respects the evidence is confirmed.

A prisoner, however, who was charged as an accessory after the fact, in an indictment against two persons for maliciously shooting, and who employed another person to harbour the principal felon, was convicted on the uncorroborated testimony of the person who harboured the latter, Gurney, J., observing, "with regard to the necessity of confirming an accomplice much may depend upon the nature of the crime in question." *Jarvis's case*, 2 *Moo. & R.* 40. The practice of requiring confirmation has been stated not to extend to misdemeanours (see *Gibbs*, *At.-Gen.*, *R.* v. *Jones*, 31 *How. St. Tr.* 315); but there appears to be no sound reason for a distinction, 1 *Phill. Ev.* 32, *9th ed.*; and *Farler's case*, 8 *C. & P.* 106, is a distinct authority that the practice does extend to misdemeanours. 2 *Russ. by Grea.* 967.

Accomplice—effect of his evidence—confirmation.] Although in practice, in order to give it effect, the evidence of an accomplice requires confirmation, it is obvious that it cannot be required to be confirmed in every particular; for if that were requisite, his testimony would be better omitted altogether. Even in Scotland, where the evidence of an accomplice unsupported is insufficient to convict, a confirmation of his testimony on certain parts of the case is all that is required. "The true way," says an eminent writer on the criminal law of Scotland, "to test the credibility of a *socius* is, to examine him minutely as to small matters, which have already been fully explained by previous, unsuspected witnesses, and on which there is no likelihood that he could think of framing a story, nor any probability that such a story, if framed, would be consistent with the facts previously deposed to by unimpeachable witnesses. If what he says coincides with what has previously been established, in the seemingly trifling, but really important matters, the presumption is strong that he has also spoken truly in those more important points which directly concern the prisoner; if it is contradicted by these witnesses, the inference is almost unavoidable, that he has made up a story, and is unworthy of credit in any particular." *Alison's Prac. of the Crim. Law of Scotl.* 157. The rule upon the subject which has generally been laid down is, that if the jury are satisfied that he speaks truth

in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks truth in other parts, as to which there may be no confirmation. So far all the authorities agree; but the point upon which a difference of opinion and of practice appears to have prevailed, is as to the particular part or parts of the accomplice's testimony, which ought to be confirmed. 1 *Phill. Ev.* 38, *8th ed.*; 34, *9th ed.* Where on the trial of several prisoners, an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest; Bayley, J., informed the jury, that if they were satisfied by the confirmatory evidence, that the accomplice was a credible witness, they might act upon his testimony with respect to others of the defendants, though as far as his evidence affected them, he had received no confirmation: and all the defendants were convicted. *Barber's case*, 3 *Stark. N. P. C.* 34. On the other hand, in a case of great importance where an accomplice swearing positively to several prisoners was confirmed as to some, and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed, were convicted and executed.

In *Stubbs's case*, 25 *L. J. M. C.* 16, the prisoner was convicted upon the uncorroborated testimony of three accomplices; and a case having been reserved for the opinion of the Court of Criminal Appeal, Jervis, C. J., said, "We cannot interfere, though we may regret the result that has been arrived at; for it is contrary to the ordinary practice. It is not a rule of law that, accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury, that they may act on the unconfirmed testimony of an accomplice; but it is usual in practice for the judge to advise the jury not to convict on such testimony alone; and juries generally attend to the judge's direction, and require confirmation. But it is only a rule of practice. There is another point to be noticed: When an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury, that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed; for the accomplice may speak truly as to all the facts of the case, and at the same time, in his evidence substitute the third person for himself in his narrative of the transaction." Parke, B., said, "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and Cresswell, J., added, "You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there."

What is a sufficient corroboration of the accomplice so as to connect the prisoner with the offence, depends greatly upon the circumstances of the case. Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one a large the other a small one, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of

mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patteson, J., "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding of the skins at the place at which the accomplice said they were, would have been no confirmation of the evidence against the prisoner; because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that, I think, is such a confirmation of the accomplice's evidence as I must leave to the jury." The prisoner was acquitted. *Birkett's case*, 8 *C. & P.* 732. It is observed on this case, in 2 *Russ. by Grea.* 965 (*i*), that assuming the confirmation in this case showed the prisoner to have been connected with the transaction, the fact of his being the receiver, and not the principal, seems to have been wholly uncorroborated.

On an indictment for manslaughter at a fight, it was objected that all persons who had been present were principals in the second degree, and that their evidence ought to receive confirmation as in the case of accomplices; but Patteson, J., was of opinion, that they were not such accomplices as would require any further evidence to confirm them. *Hargrave's case*, 5 *C. & P.* 170.

It appears to be settled by the authorities, that the question, whether evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation, is a question which the jury, and the jury only, are to determine. 1 *Phill. Ev.* 38, 9*th ed.*

Accomplice—confirmation by whom.] The practice of requiring the evidence of an accomplice to be confirmed, appears to apply equally when two or more accomplices are produced against a prisoner. In a case where two accomplices spoke distinctly to the prisoner, Littledale, J., told the jury, that if their statements were the only evidence, he could not advise them to convict the prisoner, adding, that it was not usual to convict on the evidence of one accomplice without confirmation, and that in his opinion it made no difference whether there were more accomplices than one. *Noakes's case*, 5 *C. & P.* 326. In a late case it was held by Mr. Justice Park, that a confirmation by the wife of an accomplice was insufficient, as the wife and the accomplice must be considered as one for this purpose. *Neale's case*, 7 *C. & P.* 168. See also *Jellyman's case*, 8 *C. & P.* 604.

Accomplice—situation of an accomplice when called as a witness.] Where a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices in the same crime, this practice, which was termed approvement, and which was only admitted at the discretion of the court, entitled him to pardon. But as the practice of appeal in cases of treason and felony is now abolished (69 Geo. 3, c. 46), this consequence of it has also ceased.

The practice now adopted is, for the magistrate before whom the accomplice is examined, or for the court before which the trial is had, to direct that he shall be examined, upon an understanding, that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. But this understanding cannot be pleaded by him in a bar of an indictment, nor can he avail himself of it at his

trial, for it is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the party time to apply elsewhere. *Rudd's case, Cowp.* 331; 1 *Leach*, 115, *S. C.* So where two prisoners, under sentence for murder, on being brought before the K. B. by *habeas corpus*, were asked what they had to say why execution should not be awarded against them, and one of them pleaded, *ore tenus*, that the king, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be apprehended and convicted; and that he not being the actual murderer, had given such information, and thereby entitled himself to the pardon: such plea, on demurrer *ore tenus*, by the Attorney-General was held not sufficient. *Garside's case*, 2 *A. & E.* 266. After giving his evidence, but not in such a way as to entitle him to favour, an accomplice may still be indicted for the same offence (see *post*); and though he may have conducted himself properly, he is liable to be proceeded against for *other* offences. Thus where an accomplice was admitted to give evidence against a prisoner for receiving stolen goods, and the latter was convicted, and the witness was afterwards prosecuted in another county for horse stealing, and convicted; a doubt arising whether this case came within the equitable claim to mercy, it was referred to the judges, who were unanimously of opinion, that the pardon was not to extend to offences for which the prisoner might be liable to prosecution out of the county, and the prisoner underwent his sentence. *Duce's case*, 1 *Burn's Justice*, 211, 24*th ed.* So where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow, B., submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion, that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge, whether to recommend a prisoner in such a case to mercy. *Lee's case, Russ. & Ry.* 364, 1 *Burn*, 212; *Brunton's case, Id.* 454, *S. P.* With respect to other offences, therefore, the witness is not bound to answer on his cross-examination. *West's case, Phill. Ev.* 28, 8*th ed.* (*n*). Where a receiver discovered the principals in a felony under a promise of favour, and also disclosed another felony of the same kind under an impression that by the course he had taken he had protected himself from the consequences; Coleridge, J., recommended the counsel for the prosecutor not to proceed with the indictment against the receiver for such other felony, adding, however, that if it was persisted in he was bound to try the case. The recommendation of the learned judge being yielded to, an acquittal was taken. *Garside's case*, 2 *Lew. C. C.* 38.

A prisoner who, after a false representation made to him by a constable in gaol, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession; and the conviction was approved of by all the judges. *Burley's case*, 2 *Stark. Ev.* 12 (*n*). So where in a case of burglary an accomplice, who had been allowed

to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence; Coleridge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *Moore's case*, 2 *Lew. C. C.* 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused when before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Holtham's case*, *Staff. Sp. Ass.* 1843, 2 *Russ. by Grea.* 958. So where an accomplice who was called as a witness against several prisoners, gave evidence which showed that all, except one who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *Hokes's case*, *Staff. Sp. Ass.* 1837, 2 *Russ. by Grea.* 958 (*d*).

In Scotland, the course pursued with regard to an accomplice who has been admitted against his confederates, differs from that adopted by the English law, and seems better calculated to further the ends of justice. "It has long been an established principle of our law," says Mr. Alison, "that by the very act of calling the *socius* and putting him in the box, the prosecutor debars himself from all title to molest him for the future, with relation to the matter libelled. This is always explained to the witness by the presiding judge as soon as he appears in court, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. If, therefore, on any future occasion, the witness should be subjected to a prosecution, on account of any of the matters contained in the libel on which he was examined, the proceedings would be at once quashed by the supreme court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated, by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box, but it would be much more put in hazard, if the witness was sensible that his future safety depended on the extent to which he spoke out against his associate at the bar. The only remedy, therefore, in such a case is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of those proceedings." *Alison's Prac. Cr. Law of Scotl.* 453.

EXAMINATION OF WITNESSES.

Ordering witnesses out of court.] In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court. And the right of either party to require the unexamined witnesses to retire, may be exercised at any period of the cause. *Per Alderson, B., Southey* v. *Nash*, 632. It is said, that with regard to a prisoner, this is not a matter of right; *Stark. Ev.* 162, *2nd ed.*; 4 *St. Tr.* 9. But whether it be a matter of right or of discretion for the judge, in practice the case of a prisoner forms no exception to the general rule. The rule has been held not to extend to the attorney in the cause, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the cause. *Pomeroy* v. *Baddeley, Ry. & Moo. N. P. C.* 430. But it extends to the prosecutor, if it be proposed to examine him as a witness. *Newman's case*, 3 *C. & Kir.* 260, *per Lord Campbell.* So, as it seems, a physician, or other professional person who is called to give an opinion as a matter of skill upon the circumstances of the case, may be allowed to remain. By the law of Scotland, a medical witness is directed to remain in

court during the trial, till the medical *opinion* of other witnesses begins. *Alison's Prac. Crim. Law of Scotl.* 489.

If a witness remains in court after an order made for the witnesses on both sides to withdraw, it is an inflexible rule in the court of Exchequer, that such a witness shall not be allowed to be afterwards examined. *Att.-Gen.* v. *Bulpit*, 9 *Price*, 4. It appears, however, that the rule in the Exchequer is confined to revenue cases, and that, in other cases, the rule is the same as it is in other courts, namely, that the rejection of the evidence is entirely in the discretion of the judge; *per Coleridge, J.*, *Thomas* v. *David*, 7 *C. & P.* 350; and that it is for him to say, whether, under all the circumstances of the case, he will relax the order which has been given. *Parker* v. *M'William*, 6 *Bingh.* 683; *Colley's case, Moo. & Malk.* 329. In *Chandler* v. *Horne*, 2 *Moo. & Rob.* 423, Erskine, J., stated that it was now settled by all the judges that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence: and see also to the same effect, *Cobbett* v. *Hudson*, 1 *E. & B.*; *S. C.* 22 *Law J.*, *Q. B.* 11.

Calling all witnesses whose names are on the indictment, &c.] Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment; *Simmonds's case*, 1 *C. & P.* 84; *Whitbread's case, Id.* 84 (*n.*); yet it was usual to do so, in order to afford the prisoner's counsel an opportunity to cross-examine them; *Simmonds's case, supra;* and if the prosecutor would not call them, the judge in his discretion might. *Id. Taylor's case, Id.* (*n*); *Bodle's case*, 6 *C. & P.* 186. The judges, however, have now laid down a rule, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defence if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses. *Woodhead's case*, 2 *C. & K.* 520, *per Alderson, B.*

The court has no power to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. *R.* v. *Gordon*, 2 *Dowl. N.* 417; *S. C.* 12 *Law J.*, *M. C.* 84.

Calling all parties present at any transaction giving rise to a charge of homicide.] On a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. The learned judge observed, "Every witness who was present at a transaction of this sort, ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." *Holden's case*, 8 *C. & P.* 609. See also *Stroner's case*, 1 *C. & K.* 650. And it seems that the same course should be pursued even when the party is a near relative of the prisoner, as a brother; *Chapman's case*, 8 *C. & P.* 559; or a daughter; *Orchard's case, Id.* (*n*). In *Holden's case*, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two

of them were called for the prosecution, but the third was not, and as his name was not on the indictment, the counsel for the prosecution declined calling him. Patteson, J., said, "He is a material witness who is not called on the part of the prosecution, and as he is in court I shall call him for the furtherance of justice." He was accordingly examined by the learned judge.

Recalling and questioning witnesses by the court.] It has already appeared (*supra*), that the judge may in his discretion, for the furtherance of justice, call witnesses whom the counsel for the prosecution has refused to put into the box. So he may recal witnesses that have already been examined. But where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held, that the prisoner's counsel had a right to cross-examine again if he thought it material. *Per Taunton, J., Watson's case*, 6 *C. & P.* 653. See also *Stroner's case*, 1 *C. & K.* 650.

So during the progress of the trial the judge may question the witnesses, and although the prosecutor's counsel has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witnesses he thinks fit, in order to answer the objection. *Remnant's case R. & R.* 136.

Evidence cannot be taken in cases of felony by consent, but in cases of misdemeanour it may.] Where there were two prosecutions against the prisoner for felony, and his counsel offered to admit the evidence taken on the first trial, as given in the second; Patteson, J., doubted whether that could be done, even by consent, in a case of felony, but the learned judge directed the witnesses to be resworn, and read their evidence over to them from his notes. *Foster's case*, 7 *C. & P.* 495. In cases of misdemeanour, evidence may be taken by consent. *Per Patteson, J., Foster's case, supra.* Where, however, on an indictment for perjury, it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with, and part of the prosecutor's case admitted, Lord Abinger, C. B., said, "I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." The defendant's counsel declining to make any admission, the defendant was acquitted. *Thornhill's case*, 8 *C. & P.* 575.

At what time the objection to the competency of a witness must be taken.] It was formerly considered necessary to take the objection to the competency of a witness, on the *voire dire*; and if once examined in chief, he could not afterwards be objected to on the ground of interest. *Lord Lovat's case*, 9 *St. Tr.* 639, 646, 704; 1 *Phill. Ev.* 148, 8*th ed.*; but in modern practice the rule was relaxed. The examination of a witness, to discover whether he was interested or not, was frequently to the same effect as his examination in chief, so that it saved time, and was more convenient to let him be sworn in the first instance in chief; and in case it turned out that he was interested, it was then time enough to take the objection. *Per Buller, J., Turner* v. *Pearte*, 1 *T. R.* 709; *Pengal* v. *Nicholson, Wight.* 64, 4 *Burr.* 2256. So in *Stone* v. *Blackburne*, 1 *Esp.* 37, it was said by Lord Kenyon, that objections to the competency of witnesses never

come too late, but may be made in any stage of the cause. The Court of Exchequer has decided, that the objection may be raised at any time during the trial. *Jacobs* v. *Layborn*, 11 *M. & W.*, 685.

An objection to the admissibility of a witness in high treason, on the ground that he is not properly described in the list of witnesses furnished to the prisoner, in pursuance of the statute, 7 Ann. c. 21, s. 14, must be taken in the first instance, otherwise the party might take the chance of getting evidence, which he liked, and if he disliked it, might afterwards get rid of it on the ground of misdescription. *Watson's case*, 2 *Stark.* 158; *Frost's case*, 9 *C. & P.* 183.

Voire dire.] Formerly the party against whom a witness was called might examine him respecting his interest on the *voire dire*, or might call other witnesses, or adduce other evidence in support of the objection; the modern rule being, that if the fact of interest were satisfactorily proved, the witness would be incompetent, though he might have ventured to deny it on the *voire dire*. A person might be examined on the *voire dire*, as to the contents of a written instrument without its being produced; but if he produced the instrument, it must have been read. *Butler* v. *Carver*, 2 *Stark.* 434; *Brockbank* v. *Anderson*, 7 *M. & Gr.* 295, 313.

But it is properly remarked, 1 *Stark. Ev.* 188, *3rd ed.*, that the mode of examination, under such circumstances, was in truth regulated by the discretion of the judge, according to the disposition and temper manifested by the witness. 2 *Russ. by Grea.* 919.

When the objection to the admissibility of a person tendered as a witness arose solely on his own examination on the *voire dire*, the objection might have been removed in the same manner as it was raised, namely, by the statement of the party himself, without calling for the instrument by which his competency was restored. Thus where a witness was objected to as next of kin in an action by an administrator, but on re-examination stated that he had released all his interests, the objection was held by Lord Ellenborough to be removed. *Ingram* v. *Dade*, 1817, 1 *Phill. Ev.* 150, *8th ed.*; 15 *East*, 57. The witness, however, might be cross-examined as to the validity of the release; thus when a corporator stated in the *voire dire*, that he had been disfranchised at a corporate meeting, it was held that he might be questioned to ascertain whether it was a regular meeting, and on his referring to a book in court, that the book might be inspected to impeach the regularity of the disfranchisement. *Godmanchester* v. *Phillips*, 4 *A. & E.* 550. But where the objection was attempted to be removed, not by the statement of the party called, but by other testimony, the case was governed by the usual rules of evidence. Thus if another witness was called to prove that the party supposed to be interested had, in fact, been released, such release must have been produced. *Corking* v. *Jarrard*, 1 *Camp.* 37. So where it appeared by other evidence than that of the party called himself, that he was competent, though the objection was taken at the time of the *voire dire*, it could not be answered by the statement of the witness alone, but the facts in answer must have been proved according to the usual course of evidence. See *Botham* v. *Swingler*, 1 *Esp. N. P.* 164. Thus where in an action by the assignees of a bankrupt, the bankrupt was himself called and objected to, but stated that he had obtained his certificate, which he did not produce; Best, C. J., ruled, that both his release and certificate must be produced; that it was not like the case of an objection raised by secondary evidence on the *voire dire*,

which might be removed by the same description of evidence. *Goodhay* v. *Hendry*, *M. & M.* 319. In a similar case, Tindal, C. J., said, the difficulty is, that the objection does not arise upon the *voire dire*, it appearing from the opening of the case for the plaintiffs, and from the pleadings themselves, that the witness is a bankrupt, and not merely from questions put to him when he comes into the box. *Anon. Moo. & Malk.* 321 (*n*). However, the point was otherwise decided by Mr. Justice Park, who permitted the bankrupt to give parol evidence of his certificate and release, without producing them. *Carlisle* v. *Eady*, 1 *C. & P.* 234; and see also *S. P.*, *per Parke, B.*, *Wandless* v. *Cawthorne*, *M. & M.* 321 (*n*). 1 *Phill. Ev.* 150, 8*th ed.*

Examination in chief.] After the witness has been duly sworn by the crier (*Tew's case*, 1 *Dears. C. C. R.* 429), or other officer of the court, he is examined in chief by the party calling him. Being supposed to be in the interest of that party, it is a rule, that upon such examination leading questions shall not be put to him. Questions to which the answer, "yes," or "no," would not be conclusive upon the matter in issue, are not in general objectionable. It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. *Per Lord Ellenborough*, *Nicholls* v. *Dowding*, 1 *Stark.* 81. Thus where the question is, whether A. and B. were partners, a witness may be asked whether A. has interfered in the business of B. *Id.* So where a witness being called to prove a partnership could not recollect the names of the component members of the firm, so as to repeat them without suggestion; Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness, whether certain specified persons were members of the firm. *Acerro* v. *Petroni*, 1 *Stark.* 100. So for the purpose of identification, a particular prisoner may be pointed out to the witness, who may be asked whether he is the man. *De Berenger's case*, 1 *Stark. Ev.* 125, 1*st ed.*; 2 *Stark. N. P. C.* 129 (*n*). And in *Watson's case*, 2 *Stark. N. P. C.* 128, the court held that the counsel for the prosecution might ask, in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called; Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction. *Courteen* v. *Touse*, 1 *Campb.* 43.

Upon the same principle, viz., the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary in order to establish a contradiction. Thus where counsel, on cross-examination, asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denying having used them, the counsel called a person to prove that he had, and read to him the particular words from his brief, Abbott, C. J., held that he was entitled to do so. *Edmonds* v. *Walter*, 3 *Stark. N. P. C.* 8.

Where a witness, examined in chief, by his conduct in the box shows himself decidedly averse to the party calling him, it is in the

discretion of the judge to allow him to be examined, as if he were on cross-examination. *Bastin* v. *Carew*, *Ry. & Moo. N. P. C.* 127; *Clarke* v. *Saffery*, *Id.* 126; *Murphy's case*, 8 *C. & P.* 297; *per Lord Abinger, C. B.*, *Chapman's case*, 8 *C. & P.* 558. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held by Best, C. J., that the counsel may, as a matter of right, cross-examine him. *Clarke* v. *Saffery*, *Ry. & Moo. N. P. C.* 126. Somewhat similar to this is the question whether, where a witness, called for one party, is afterwards called by the other, the latter party may give his examination the form of a cross-examination; and it has been held, by Lord Kenyon, that he may; for, having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. *Dickenson* v. *Shee*, 4 *Esp.* 67; 1 *Stark. Ev.* 162, 2nd ed.

Cross-examination.] Leading questions are admitted on cross-examination, in which much larger powers are given to counsel than in the original examination. The form of a cross-examination, however, depends in some degree like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the party who cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule with regard to putting leading questions on cross-examination, was thus laid down by Mr. Justice Buller: "You may lead a witness upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the witness's mouth the very words he is to echo back again." *Hardy's case*, 24 *How. St. Tr.* 755.

In a later case, where an objection was made to leading a willing witness, Alderson, B., said, "I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not." *Parkin* v. *Moon*, 7 *C. & P.* 405.

When two or more prisoners are tried on the same indictment, and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them. *Burdett's case*, 2 *Dears. C. C. R.* 431; *S. C.* 24 *L. J. M. C.* 63.

A reporter to a newspaper cannot be asked on cross-examination, whether, in articles he has written for the newspaper, he has not called the opposite party nicknames, as that is part of the contents of the articles. *Murphy's case*, 8 *C. & P.* 297. Where a witness, on being asked upon cross-examination to repeat an answer she had previously given before the whole of it was taken down, omitted a part of it, and denied she had uttered such part, the judge allowed the shorthand reporter of the court, who had taken down the answer, to be examined to prove the fact. *Slater's case*, 6 *C. & P.* 334.

If the counsel, on cross-examining a witness, puts a paper into his hand and questions him upon it, and anything comes of such

questions, the counsel on the other side have a right to see the paper, and re-examine upon it; but if the cross-examination founded on the paper entirely fails, the opposite counsel have no right to see the paper. *Duncombe's case*, 8 *C. & P.* 369.

Where a witness is called merely to produce a document which can be proved by another, and he is not sworn, he is not subject to cross-examination. *Simpson* v. *Smith*, 1822, *cor. Holroyd, J.*; 2 *Phill. Ev.* 397, *9th ed.*; and *per Bayley J.*, 1824, 1 *Stark. Ev.* 129, *2nd ed.*; *Davis* v. *Dale*, *Moo. & Malk.* 514. Thus where, on an indictment for perjury, a sheriff's officer had been subpœnaed to produce a warrant of the sheriff, after argument he was ordered to do so without having been sworn. *Murlis's case*, *Moo. & Malk.* 515. But where the party producing a document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. *Brooke's case*, 2 *Stark.* 472. Where, however, a person called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush* v. *Smyth*, 4 *Tyrw.* 675; 1 *Cr., M. & R.* 94. So where a witness has been asked only one immaterial question, and his evidence is stopped by the judge, the other party has no right to cross-examine him. *Crery* v. *Carr*, 7 *C. & P.* 64. Where a witness is sworn, and gives some evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes. *Morgan* v. *Bridges*, 2 *Stark. N. P.* 314.

As already stated, it has been held at nisi prius, that if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause, so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. *Dickenson* v. *Shee*, 4 *Esp.* 67.

Re-examination.] A re-examination which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject-matter of the cross-examination. 1 *Stark. Ev.* 179, *2nd ed.* The re-examination of a witness if not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel. 1 *Phill.* 840, *Ev. 9th ed.*

The rule with regard to re-examinations is thus laid down by Abbott, C. J., in *the Queen's case*, 2 *Br. & Bingh.* 297. "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." "I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject-matter of the suit, are in themselves evidence against him, in the suit: and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for

that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." In *Prince* v. *Samo*, 7 *A. & E.* 627, the court of Q. B. said they could not assent to the doctrine laid down in the above case, and they held, that when a statement made by a party to a suit in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on re-examination as tends to qualify or explain the statement made on cross-examination. Recognised in *Sturge* v. *Buchanan*, 10 *A. & E.* 605.

When one of the plaintiff's witnesses stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett* v. *Tregoning*, 3 *A. & E.* 554.

Memorandum to refresh witness's memory.] It has already been stated, that a witness may refer to an informal examination taken down by himself, in order to refresh his memory. *Ante*, p. 64. So he may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates, although the entry or memorandum would not of itself be evidence, *Kensington* v. *Inglis*, 8 *East*, 289; as, formerly, an unstamped paper, *Maugham* v. *Hubbard*, 8 *B. & C.* 14. But a witness cannot refresh his memory by extracts from a book, though made by himself, *Doe* v. *Perkins* 3 *T. R.* 749; or from a copy of a book; for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. *Burton* v. *Plummer*, 2 *A. & E.* 343, 344. *Alcock* v. *The Royal Exchange Ins. Co.* 13 *Q. B.* 292.

Where a witness on looking at a written paper has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. Thus where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them. *Taylor. Ev.* 1095, *2nd ed., and cases there cited.*

Where the witness cannot speak without referring to a book, the book must be produced in court. *Per Coleridge, J.*, *Howard* v. *Canfield*, 5 *Dowl. P. C.* 417. If produced, the counsel for the other party has a right to see it, and cross-examine from it; *Hardy's case*, 24 *How. St. Tr.* 824; or he may look at it and ask when it was written, without being bound to put it in evidence. *Ramsden's case*, 2 *C. & P.* 603. If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence. *Per Gurney, B.*, *Gregory* v. *Travenor*, 6 *C. & P.* 281.

Questions subjecting witness to a civil suit.] Whether a witness was bound to answer questions which might subject him to a civil action,

or charge him with a debt, was formerly much doubted; but by the 46 Geo. 3, c. 37, it is *declared* and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty or any other person. The statute does not extend to compel parties, who stand in the situation of parties to the suit (as a rated inhabitant, in case of an appeal) to give evidence. *R.* v. *Inhabitants of Woburn*, 10 *East*, 395 (*decided before the passing of the 54th Geo.* 3, *c.* 170).

Questions subjecting witness to a forfeiture.] A witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. The declaratory statute (46 Geo. 3, c. 37, *supra*) implies that a witness may legally refuse to answer any question which has a tendency to a forfeiture of any nature whatsoever.

Questions subjecting witness to penalties or punishment, &c.] A witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge. Thus in an action for a libel, in the shape of an extra-judicial affidavit sworn before a magistrate, the clerk to the magistrate was not compelled to answer the question, whether he had written the affidavit at the desire of the defendant, on the ground that it tended to criminate himself. *Maloney* v. *Bartley*, 3 *Campb.* 210. So on an appeal against an order of bastardy, a person cannot be compelled to confess himself the father of a bastard child. *R.* v. *St. Mary, Nottingham*, 13. *East*, 58 (*n*). Nor can the prosecutrix, on an indictment for rape, be compelled to answer whether she has had criminal intercourse with a particular individual. *Hodgson's case*, *Russ. & Ry. C. C.* 211 (but see *ante*, pp. 93, 94). On the same principle, an accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth, respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences in which he was not connected with the prisoner, for he is not protected from a prosecution for such offences. *West's case*, *O. B.* 1821. So a witness cannot be called upon to answer a question which subjects him to the penalties of usury. *Cates* v. *Hardacre*, 3 *Taunt.* 424. See *Jackson* v. *Benson*, 1 *Y. & J.* 32. But if the time limited for the recovery of the penalty has expired, the witness may be compelled to answer. *Roberts* v. *Allatt*, *M. & M.* 192.

It is not necessary, in order to render the question objectionable, that it should directly criminate the witness: it is sufficient if it has a tendency to do so. Thus where there was a question whether there had been usury in a bill of exchange, a witness being asked whether the bill had ever been in his possession before, objected to the question; and Mansfield, C. J., refused to compel him to answer the question, observing that it went to connect the witness with the bill, and might be a link in a chain. *Cates* v. *Hardacre*, 3 *Taunt.* 424. Lord Eldon also, in *Paxton* v. *Douglas*, 19 *Ves.* 227, expressed an opinion that a party should be protected from questions, not only that have a direct tendency to criminate him, but that form one step towards it. See also *Claridge* v. *Hoare*, 14 *Ves.* 59; *Swift* v. *Swift*,

4 *Hagg. Eccl. R.* 154. *S. P. per Lord Tenterden, Slaney's case,* 5 *C. & P.* 213.

It has been held, however, by Lord Abinger, C. B., that a vestry clerk cannot refuse to produce the vestry book kept in pursuance of the 58 Geo. 3, c. 69, s. 2, on the ground that it may criminate him. *Bradshaw* v. *Murphy*, 7 C. & P. 612.

Questions subjecting a witness to penalties or punishment, &c.—whether they may be put.] Whether questions, the answers to which would expose the witness to punishment, ought not to be allowed to *be put*, or whether the witness ought merely to be protected from *answering* such questions, does not appear to be settled. In *Reading's case*, 7 *How. St. Tr.* 226, it was decided that a question tending to charge a witness with a criminal offence, ought not to be put, although he had been pardoned. Lord Chief Justice North said, "If he hath not his pardon, his life is in danger; if he hath, neither his life nor name must suffer, and therefore such questions must not be asked him." Although this decision has been remarked upon, and it has been said that it ought not to be considered binding, from the nature of the trial and the period at which it took place (See *Moo. & Malk. N. P. C.* 493 *n.*), yet that observation must, it seems, be confined to the rejection of the question after the witness had been pardoned. In *Cundell* v. *Pratt*, *Moo. & M.* 108, where the witness was asked whether she had been guilty of incest with a particular individual, Best, C. J., *prohibited the question.* So where on a trial for high treason, one of the witnesses was asked a question tending to show that he had been guilty of bigamy, in order to discredit him, Lord Ellenborough observed, "You may ask the witness whether he has been guilty of such a crime; *this indeed would be improperly asked*, because he is not bound to criminate himself; but if he does answer promptly, you must be bound by the answer which he gives." *Watson's case*, 2 *Stark. N. P. C.* 151, *sed vide post.*

On the other hand, there are not wanting authorities to show that even where the question goes to criminate the witness, it may yet be put, although he cannot be compelled to answer it. This appears to have been the opinion of Bayley, J., in *Watson's case*, 2 *Stark. N. P. C.* 153. And the same learned judge is said to have ruled that a witness may be asked a question, the answer to which may subject him *to punishment*, but that he is not compellable to answer it; and that all other questions for the purpose of impeaching a witness's character, may not only be put, but must be answered. *Holding's case*, *O. B.* 1821, *Archb. C. L.* 102, *2nd ed.* It may, however, be doubted, how far this decision is correctly reported, especially with regard to the concluding position. In a text book of great value, it is said that it seems such questions can be put. 2 *Russ.* 625, 626, *2nd. ed.* In the same work it is added, that if the imputations contained in the question be so connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited, *must* be asked whether he has been guilty of the offence imputed.

Upon principle it would seem that questions tending to expose the witness to *punishment*, may be *put*, as well as questions tending to degrade his character. The ground of objection in the first case is, not that the question has a tendency to degrade him, but that advantage may be taken of his answer in some future proceedings

against him, and the rule that no person is bound to accuse himself is urged. This objection is, however, completely removed by permitting the witness not to answer the question, for his silence would not in any future proceeding be any admission of guilt. The question may then be regarded as one simply tending to degrade the witness, and would come within the rule which appears to be now well established, that it may be *put*, though the witness is not compellable to give an answer, or that if he does give an answer, the party examining him must be satisfied with it.

This point appears to have been settled in the law of Scotland, by modern determinations; and it is now held in that country, that it is competent to ask a witness whether he has been engaged in any *specific* crimes, although they have no connexion with the crime under investigation; but it is also held to be the privilege of the witness to decline answering, according to the rule, *Nemo tenetur jurare in suam turpitudinem.* In the case of the Cupar rioters, a witness was asked whether he had ever been engaged in the lifting of dead bodies. *Lindsey's case*, 1829, *Alison's Pract. Cr. Law of Scotl.* 527. And in *Burke's case*, *Syme*, 365, 367, *Alison*, 527, the court allowed Hare, the witness, to be asked whether he had ever been engaged in any other murder, expressly warning him that he was at liberty to decline answering, which he accordingly did.

Questions subjecting a witness to penalties, punishment, &c.—consequence of answering.] Answers given to questions to which the witness might have demurred, may be given in evidence against him. *Smith* v. *Beadnell*, 1 *Campb.* 33. It has been laid down as law, that if the witness answers questions on the examination in chief, tending to criminate himself, he is bound to answer on the cross-examination, though the answer may implicate him in a transaction affecting his life. *Per Dampier*, *J.*, *Winchester Sum. Ass.* 1815. And that if the witness begins to answer, he must proceed. On a trial for libel, a witness was asked whether he had not furnished the editor of a newspaper with the report. He answered one or two questions on the subject, when, being further pressed, he appealed to to the court for protection, but Abbott, C. J., said, "You might have refused to answer at all; but having partially answered, you are now bound to give the whole truth." *East* v. *Chapman*, *M. & M.* 47; 2 *C. & P.* 571, *S. C.* So Best, C. J., laid it down, that if a witness, being cautioned that he is not compellable to answer a question which may tend to criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction. *Dixon* v. *Vale*, 1 *C. & P.* 279; see also, *Austin* v. *Poiner*, 1 *Simons*, 348. However, in *Garbett's case*, 1 *Den. C. C. R.* 258, nine against six of the judges held, that it made no difference in the right of the witness to protection that he had chosen to answer in part; being of opinion that he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge (after such a claim) could be given in evidence against him, and that they did not consider themselves bound by the ruling in *East* v. *Chapman* and *Dixon* v. *Vale*.

Questions subjecting a witness to penalties or punishment, &c.—consequence of not answering.] Where a witness is entitled to decline answering a question, and does decline, the rule is said by Holroyd, J., to be, that this not answering can have no effect with the jury.

Watson's case, 2 *Stark*. 157. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal; Abbott, C. J., interposed and said, that no inference was to be drawn from such refusal. *Rose* v. *Blakemore*, *Ry. & Moo. N. P. C.* 384. A similar opinion was expressed by Lord Eldon. *Lloyd* v. *Passingham*, 16 *Ves.* 64; see the note *Ry. & Moo. N. P. C.* 385. However, it is said by Bayley, J., in *Watson's case*, 2 *Stark*. 153, "If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness, whether he has committed a particular crime, it would perhaps be going too far to say, that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

Questions subjecting witness to penalties or punishment, &c.—objection must be taken by the witness himself.] The privilege of objecting to a question, tending to subject the witness to penalties or punishment, belongs to the witness only, and ought not to be taken by counsel, who will not be allowed to argue it. *Thomas* v. *Newton*, *M. & M.* 48 (*n*); *S. P. Adey's case*, 1 *Moo. & R.* 94, *Lord Tenterden, C. J.* "It appears to be still an undecided point, whether the mere declaration of a witness on oath, that he believes that the answer will tend to criminate him, will suffice to protect him from answering, when the other circumstances of the case are not such as to induce the judge to believe that the answer would in reality tend to criminate the witness." *Taylor. Ev.* 1135, *2nd ed.* In *Fisher* v. *Renalds*, 12 *C. B.* 762; Jervis, C. J., and Maule, J., intimated an opinion, that the witness might determine for himself whether or not his answer would have a tendency to criminate him; but this doctrine was questioned by Parke, B., in *Osborn* v. *The London Dock Company*, 10 *Ex. R.* 701; and see *Garbett's case*, 1 *Den. C. C. R.* 258.

Whether a witness is bound to answer questions tending to degrade him.] The point has frequently been raised and argued, whether a witness, whose credit is sought to be impeached on cross-examination, is bound to give an answer to the questions put to him with that view. The doubt only exists where the questions put are not relevant to the matter in issue, but are merely propounded for the purpose of throwing light on the witness's character; for if the transactions to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character. 2 *Phill. Ev.* 421, *9th ed.*

The first point to be considered on this subject is, whether questions not relevant to the matter in issue, and tending to degrade the character of the witness, are allowed to be put. There does not appear to be any authority in the earliest cases for the position, that the questions themselves are inadmissible upon cross-examination. In *Cook's case*, 13 *How. St. Tr.* 334; 1 *Salk.* 153, *S. C.*, Treby, C. J., appears to admit the legality of the practice, adding, that the witnesses have not been obliged to answer. In *Sir John Friend's case*, 11 *How. St. Tr.* 1331, the court held, that a witness could not be asked whether he was a Roman Catholic, because he might by his answer subject him to severe *penalties*. In *Layer's case*, 16 *How. St. Tr.* 161, a question tending to degrade the witness was proposed to be asked on *the voire dire*, and Pratt, C. J., said, "It is an

objection to his credit, and if it goes to his credit, must he not be sworn, and his credit go to the jury?" These, therefore, are only authorities to show that a witness will not be *compelled to answer* such questions. Many later decisions show that such questions are admissible, though the witness cannot be called upon to answer them. Thus, on an application to bail a prisoner, the court allowed the counsel for the prosecution to ask one of the bail, whether he had not stood in the pillory for perjury. The court said, there was no objection to the question, as the answer could not subject the bail to any punishment. *Edward's case*, 4 *T. R.* 440. In *Watson's case*, for high treason, such questions were frequently asked, "and it may be inferred," says Mr. Phillipps, "from the opinion of the judges on an argument in that case, that such questions are regular." *Gurney's report of Watson's trial*, 288—291; *Phill. Ev.* 922 (*n*), *8th ed.*; see also *Lord Cochrane's trial*, 419, *by Gurney*; *Hardy's case*, 24 *How. St. Tr.* 726; 11 *East*, 311. In the following case, Best, C. J., laid down the same rule in these words: "The rule I shall always act upon is, to protect witnesses from questions, the answers to which would expose them to punishment; if they are protected beyond this, from questions which tend to degrade them, many an innocent man might suffer." *Cundell* v. *Pratt*, *M. & M.* 108. So it is stated by Mr. Phillipps, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation, and that the common practice of courts of justice, before the most approved judges, will abundantly furnish instances of such questions being put, and not being disallowed as contrary to the rules of law: "and it is difficult to see," Mr. Phillipps adds, "how a question can properly be deemed illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence." 2 *Phill. Ev.* 427, *9th ed.*

There are, however, one or two decisions, countenancing the opinion, that questions tending to degrade the character of a witness, shall not be allowed to be put. Upon an indictment for an assault, a common informer and man of suspicious character having been called, was asked on cross-examination, whether he had not been in the house of correction. Upon this Lord Ellenborough interposed, and said that *the question should not be asked*. That it had been formerly settled by the judges, among whom were Chief Justice Treby and Mr. Justice Powell, both very great lawyers, that a witness was *not bound to answer* any question the object of which was to degrade, or render him infamous. He added, that he thought the rule ought to be adhered to, as it would be an injury to the administration of justice, if persons who came to do their duty to the public might be subjected to improper investigation. *Lewis's case*, 4 *Esp.* 225. Upon this case it may be observed, that the authorities referred to by Lord Ellenborough, do not go the length of excluding the *question*, but merely decide that the witness is not bound to answer. As already stated also, Lord Ellenborough was in the frequent habit of allowing such questions to be put, and on these grounds Mr. Phillips is disposed to think that the question had already been put and answered, and being repeated, his lordship thought it necessary to interpose for the protection of the witness. In another case, where a witness was asked on cross-examination, whether she lived in a state of concubinage with the plaintiff, Lord Alvanley interposed, and gave the following opinion on the subject of such questions: "He thought questions as to general conduct might be asked,

but not such as went immediately to degrade the witness; he would therefore allow it to be asked, whether she was married, as she might be married to the plaintiff. But having said she was not, he would not allow it to be asked, had she slept with him?" He added, "I do not go so far as others may. I do not say that a witness may not be asked as to what may tend to disparage him, that would prevent an investigation into the character of the witness, which may often be of importance to ascertain. I think those questions only should not be put, which have a direct or immediate effect to disgrace or disparage the witness." *Macbride* v. *Macbride*, 4 *Esp*. 242. Upon an indictment for a rape, the prosecutrix, on cross-examination, was asked, "Whether she had not before had connexion with other persons, and whether not with a particular person (named)." This question was objected to, and the point was reserved for the opinion of the judges, who held the objection good. *Hodgson's case*, *Russ. & Ry. C. C.* 211 (but see *ante*, pp. 93, 94). It does not appear in the latter case, whether the question itself was objected to, or only that the witness was not bound to answer it; but both in this and in *Macbride* v. *Macbride* it seems that the questions were improper to *be put*, as they imputed to the witness *an offence* punishable by the ecclesiastical law. Upon the same ground, Best, C. J., interposed to prevent a witness being asked whether she lived in a state of incestuous concubinage with a particular person. *Cundell* v. *Pratt*, *M. & M.* 108. Where in an action for seduction, the party seduced was asked, whether she had not been criminal with other men; Lord Ellenborough said, this was a question she ought not to answer, and that the same point having been referred to the judges, they were all of the same opinion. *Dodd* v. *Norris*, 3 *Campb*. 519. But in *Carpenter* v. *Wall*, 11 *A. & E.* 803, which was an action brought for debauching the plaintiff's daughter, where the facts were proved by the daughter, the court of Queen's Bench seem to have thought that she might have been asked if she had not said that another party was the father of the child, and had seduced and left her.

With regard to *compelling* a witness to answer questions tending to degrade him (such questions not being relevant to the matter in issue), there appear to be only two authorities that a witness is so bound. In *Holding's case*, *O. B.* 1821, *Arch. Cr. Pl.* 102, *2nd ed.*, Bayley, J., is reported to have ruled, that though a witness may refuse to answer a question exposing him to punishment, yet all other questions for the purpose of impeaching his character, may not only be put, but must be answered. So where in a civil cause, a witness being asked on cross-examination, whether he had not been tried for theft, refusing to answer, and appealing to Lord Ellenborough, whether he was bound to answer, his lordship said, "If you do not answer the question I will commit you;" adding, "you shall not be compelled to say whether you were guilty or not." *Frost* v. *Holloway*, 1818, 2 *Phill. Ev.* 425 (*n*), *9th ed.* Assuming that a question is not irregular, merely from its tendency to degrade the witness's character, and that the witness is not compellable to answer; yet if he chooses to give an answer, the party who asks the question must be bound by his answer, and cannot be allowed to falsify it by evidence. See *Watson's case*, *ante*, p. 166. If, however, a witness be asked, on cross-examination, whether he has been convicted, the question if objected to ought to be rejected, unless the record is produced; nor can he be asked on cross-examination whether he did not write a certain letter in answer to another, charging him with an

offence, without such other letter being first produced (its non-production being unexplained), although the object of the cross-examination is only to discredit the witness. *Macdonnell* v. *Evans*, 11 *Com. B.* 935; *S. C.* 21 *L. J. C. P.* 142.

Evidence of general character.] Where a witness is called to impeach the general character for veracity of another witness, he cannot be examined as to particular facts. The proper question is, "From your knowledge of his general character, would you believe him on his oath?" If the witness state that he has seen him before a magistrate, and from what passed there he would not believe him on his oath, it is not evidence. *Mawson* v. *Hartsink*, 4 *Esp.* 102. "The rule is," says Mr. Justice Bayley, "that a party against whom a witness is called, may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him." *Watson's case*, 2 *Stark. N. P. C.* 152. "The reason," says Pratt, C. J., "why particular facts are not to be given in evidence, to impeach the character of a witness is, that if it were permitted, it would be impossible for a witness having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the character of witnesses might be villified, without their having any opportunity of being vindicated." *Layer's case*, 14 *How. St. Tr.* 285. But no such injustice attends an inquiry into the general character of a witness. "General character," says Chief Justice Gibbs, "is the result of general conduct, and every witness who presents himself in a court of justice, undertakes for that." *Sharp* v. *Scoging*, *Holt's N. P. C.* 541. In answer to general evidence of bad character for veracity, the witnesses called to prove it may be examined as to their means of knowledge. *Mawson* v. *Hartsink*, 4 *Esp.* 103; and the grounds of their opinion; or the other party may attack their general character, and by fresh evidence support the character of his own witness. 2 *Phill. Ev.* 432, 9*th ed.* In the common case where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. *Bishop of Durham* v. *Beaumont*, 1 *Campb.* 207.

When a party may contradict his own witness.] It is clear that the party calling a witness, will not be allowed to give general evidence that he is not to be believed on his oath. *Ewer* v. *Ambrose*, 3 *B. & C.* 750, *Bull. N. P.* 297. But where a witness is called, and makes statements contrary to those which are expected from him, the party calling him may prove the facts in question by other witnesses. *Alexander* v. *Gibson*, 2 *Campb.* 555; *Lowe* v. *Joliffe*, 1 *W. Bl.* 365; *Ewer* v. *Ambrose*, 3 *B. & C.* 749; 4 *B. & Ad.* 193. Where a witness is contradicted by the party calling him, as to certain facts, it is not necessary that the remainder of his evidence should be repudiated. *Bradley* v *Ricardo*, 8 *Bingh.* 57. Whether the party calling a witness, who gives evidence contrary to what is expected from him, may prove contradictory statements previously made by the witness, is a question on which there has been some difference of opinion. Where a witness made such a statement, and the party calling him proved a contradictory statement made by the witness in an answer to a bill in Chancery, the court of King's Bench held, that the judge had improperly left it to the jury to say whether they believed the witness's statement at the trial, or that in his answer; the latter, at all events, not being evidence of the facts stated in it. *Ewer* v.

Ambrose, 3 *B. & C.* 746. In this case Holroyd, J., observed, "The answer might, perhaps, be admissible, if the effect of it only were to show that as to the particular fact sworn to at the trial, the witness was mistaken. But if its effect were to show that the witness was not worthy of credit, then it was not admissible. *Id.* 750. Where the prisoner's mother, whose name was on the back of the indictment, was, by the direction of the judge, called as a witness for the prosecution, and her evidence was in favour of the prisoner, and materially differed from her deposition before the coroner, the judge thought it proper to have that deposition read, and stated to the jury that her testimony was not to be relied upon. The point being reserved for the opinion of the judges, they were all of opinion, that under the circumstances of the case, it was competent to the judge to order the depositions to be read, to impeach the credit of the witness. Lord Ellenborough and Lord Chief Justice Mansfield thought that the prosecutor had the same right. *Oldroyd's case*, *Russ. & Ry. C. C.* 88. And where, in an action of trespass, one of the witnesses for the plaintiff swore contrary to the statement which he had made before the trial to the plaintiff's attorney; Lord Denman, C. J., permitted the latter to prove the contradictory statement. *Wright* v. *Beckett*, *Lanc. Sum. Ass.* 1833, 1 *Moo. & R.* 414, *S. C.* The correctness of the ruling in the above case was afterwards argued before Lord Denman, C. J., and Bolland, B., sitting as judges of the court of Common Pleas at Lancaster, when those learned judges differed and delivered their opinions at length. See 1 *Moo. & R.* 416. In accordance with the principle laid down in the above case, Lord Denman has also held, that a party calling a witness who, on cross-examination, has given testimony unfavourable to him, may, on re-examination, ask the witness questions to show inducements to betray him. *Dunn* v *Aslett*, 2 *Moo. & R.* 122. But see *Holdsworth* v, *The Mayor of Dartmouth*, where Parke, B., held, that when a witness gives, on cross-examination, unfavourable testimony to the party calling him, and, on re-examination, denies having given a different account of the matter so spoken to, the party so calling him has no right to discredit him by showing he had given such different account. 2 *Moo. & R.* 153. See also similar rulings in *Winter* v. *Butt*, 2 *Moo. & R.* 357; *Allay* v. *Hutchings*, 2 *R. & M.* 358, and *Reg.* v. *Clayfield*, 2 *Russ. by Grea.* 943. In *Williams's case*, 6 *Cox*, *C. C.* 343, where a witness for the prosecution gave a different answer on examination in chief to that which was expected, Williams, J., allowed his deposition before the coroner to be put in his hands for the purpose of refreshing his memory, and the question to be then put to him; and the witness persisting in the same answer, the question was allowed to be repeated to him from the depositions in a leading form. The counsel for the prosecution will not, however, it seems, be allowed to contradict his witness by putting in his former deposition. *Taylor Ev.* 1111.

Examinations as to belief.] A witness can depose to such facts only as are within his own knowledge; but even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not aver positively to these facts. See *Miller's case*, 3 *Wils.* 427. It has been

decided, that for false evidence so given, a witness may be indicted for perjury. *Pedley's case*, 1 *Leach*, 325; *R.* v. *Schlesinger*, 10 *Q. B.* 670.

Examination as to opinion.] Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* only; yet where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is. Thus an engineer may be called to say what, in his opinion, was the cause of a harbour being blocked up. *Folkes* v. *Chad*, 3 *Dougl.* 157; 4 *T. R.* 498, *S. C.* In a variety of other cases also, such evidence has been admitted. "Many nice questions," observes Lord Mansfield, "may arise as to forgery, and as to the impression of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." *Folkes* v. *Chad*, 3 *Dougl.* 159. So it seems is the opinion of any person in the habit of receiving letters, of the genuineness of a post-mark. See *Abbey* v. *Lill*, 5 *Bingh.* 299. So antiquaries as to the date of ancient handwriting. *Tracy Peerage*, 10 *Cl. & Fin.* 191. So the opinion of a ship-builder, on a question of sea-worthiness. *Thornton* v. *Roy. Exch. Ass. Co. Peake, N. P. C.* 25, 1 *Camp.* 117; *Chapman* v. *Walton*, 10 *Bingh.* 57. However, the Court of Queen's Bench in *Campbell* v. *Richards*, 5 *B. & Ad.* 840, held (overruling several previous decisions), that the materiality of a fact concealed at the time of insuring, was a question for the jury alone. "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another."

It is the constant practice to examine medical men as to their judgment with regard to the cause of a person's death, who has suffered violence; and where, on a trial for murder, the defence was insanity, the judges to whom the point was referred, were all of opinion that in such a case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it? Several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *Wright's case*, *Russ. & Ry.* 456. On an indictment for cutting and maiming, Park, J., on the authority of the above case, allowed a medical man who had heard the trial, to be asked whether the facts and appearances proved showed symptoms of insanity. *Searle's case*, 1 *Moo. & R.* 75. And it seems that in McNaughten's case such questions were allowed to be asked. 2 *Russ. by Grea.* 925 (*n*). A question may arise in these cases, whether, where a witness, a medical man, called to give his opinion as matter of skill, has made a report of the appearances or state of facts at the time, he may be allowed to read it as part of his evidence. The practice in Scotland on this point is as follows: The scientific witness is always directed to read his report, as affording the best evidence of the appearances he was called on to

examine; yet he may be, and generally is, subjected to a further examination by the prosecutor, or to a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions made to him by the prisoner, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and can only refer to the memoranda to refresh his memory. *Alison's Prac. Cr. Law of Scotland*, 541.

Where on an indictment for uttering a forged will, which, together with the writings in support of such will, it was suggested, had been written over pencil marks which had been rubbed out; Parke, B. (after consulting Tindal, C. J.) held, that the evidence of an engraver who had examined the paper with a mirror, and traced the pencil marks, was admissible on the part of the prosecution, but that the weight of the evidence would depend upon the way in which it would be confirmed. *William's case*, 8 *C. & P.* 434.

In proving the laws of foreign countries also, the opinions of competent witnesses are admissible. The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill; but where the laws are in writing, a copy properly authenticated, must be produced. *Per Gibbs, C. J., Millar* v. *Heinrick*, 4 *Campb.* 155; but see *Boehtlinck* v. *Schneider*, 3 *Esp.* 58. Thus on the trial of the Wakefields for abduction, a gentleman of the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the law of Scotland. *Wakefield's case, Murray's ed.*, p. 238. So it is laid down by a foreign writer of eminence, that foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved by parol evidence. The proper course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. *Sussex Peerage case*, 11 *Cl. & Fin.* 115; *Cocks* v. *Purday*, 2 *C. & Kir.* 269.

CREDIT OF WITNESSES—HOW IMPEACHED AND SUPPORTED.

Credit of witnesses, how impeached—general rules.] THE credit of a witness may be impeached, either simply by questions put to him on cross-examination, or by calling other witnesses to impeach his credit.

Questions with regard to particular facts tending to degrade the witness, and affect his character and credit, may be put to him on cross-examination, even though irrelevant to the matter in issue; but the party putting them must be satisfied with the answers given by the witness, and cannot call witnesses to prove those answers false.

Questions with regard to such particular facts may be put to a witness on cross-examination, and if relevant to the matter in issue and denied by the witness, other witnesses may be called by the cross-examining party to contradict him.

Where the witness himself is not cross-examined to impeach his credit, but other witnesses are called for that purpose, they cannot be examined as to particular facts, but only as to the witness's general character for veracity.

The party calling a witness will not, on his giving evidence against him, be allowed to call witnesses to impeach his credit.

The cases decided upon these general rules will now be stated.

Credit impeached by irrelevant questions on cross-examination.] Although it is not allowable on cross-examination to put questions to a witness, not relating to the matter in issue, for the purpose, if he answers them against the cross-examining party, of contradicting him by other witnesses, yet it is a well-established rule, that questions not relevant may be put to a witness for the purpose of trying his credibility; but in such case the party cross-examining must be satisfied with his answer. *Spenceley* v. *De Willott*, 7 *East*, 108. Thus where on a trial for sheep-stealing, the principal witness being the prisoner's apprentice, Lawrence, J., permitted him on cross-examination to be asked, whether he had not been charged with robbing his master, and whether he had not said he would be revenged of him, and would soon fix him in gaol. The witness answering both questions in the negative, the prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him; but Lawrence, J., said, that his answer must be taken as to the former, but as the *words* were material to the guilt or innocence of the prisoner, evidence might be adduced

that they were spoken by the witness. *Yewin's case*, 2 *Campb.* 638 (*n*). A witness was asked whether he had not attempted to persuade a person called by the other side, from attending to give his evidence, which he denied. It was proposed to call a witness to contradict him; but Lawrence, J., said, "Had this been a matter in issue, I would have allowed you to call witnesses to contradict, but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness, as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call witnesses to contradict the answers. No witness can be prepared to support his character as to particular facts, and such inquiries would lead to endless confusion." *Harris* v. *Tippett*, 2 *Campb.* 637. See also *Att.-Gen.* v. *Hitchcock*, 1 *Ex. R.* 93, where the witness having denied that he had said that he had been offered 20*l.* to give evidence for the crown, the Court of Exchequer held that witnesses could not be called to contradict him.

So where a witness to the character of a prisoner was cross-examined as to whether he had not said the prisoner should be acquitted if it cost him 20*l.*, and whether he had not endeavoured to persuade some of the witnesses for the prosecution to forbear to give evidence, both of which he denied; Coleridge, J., held, that evidence could not be called to contradict him. *Lee's case*, 2 *Lewin*, *C. C.* 154.

On the trial of Lord Stafford, proof was admitted on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavoured to suborn witnesses to give false evidence against the prisoner. 7 *How. St. Tr.* 1400.

Credit impeached—by relevant questions—and contradiction by other witnesses.] Where a question tending to impeach the credit of the witness is not irrelevant to the issue, he may not only be compelled to answer it, but the other side may call witnesses for the express purpose of contradicting him. In an action against the defendant as the maker of a promissory note, which by his plea he denied having made, Coleridge, J., permitted a female servant of the plaintiff, who was one of the attesting witnesses to the note, to be asked, in cross-examination, whether she did not constantly sleep with her master, and on her denying it, allowed a witness to be called to prove she did so. The learned judge observed, "The question is whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery, just in the same way as if she had been asked if she was the sister or daughter of the plaintiff, and had denied the fact." *Thomas* v. *David*, 7 *C. & P.* 350. So in *Alcock* v. *The Royal Exchange Insurance Company*, 13 *Q. B.* 292, which was an action brought by a shipowner against the underwriters on a policy of assurance, to recover as for a total loss, the captain having been called by the plaintiffs to show that he had exercised a sound judgment in abandoning the vessel; and having denied on cross-examination that previous to the voyage insured against he had been an habitual drunkard, witnesses were allowed to be called by the defendants to establish the fact of such habitual drunkenness.

So what has been said or written by a witness at a previous time, may be given in evidence to contradict what he has said at the trial, if it relate to the matter in issue. *De Sailly* v. *Morgan*, 2 *Esp.* 691. Thus in a policy case, the captain's protest has been admitted in

evidence to contradict what he has stated at the trial. *Christian* v. *Coombe*, 2 *Esp.* 489.

On the question, what matter is receivable in evidence, what not receivable, for the purpose of contradicting a witness (by proof of contrary statements made by him), it is not possible to lay down any precise general rule. The evidence offered for that purpose, must relate to something stated by the witness, not wholly irrelevant to the matters in issue. But in order to let in this evidence in contradiction, a ground must be laid for it, in the cross-examination of the witness who is to be contradicted. When a witness has been examined as to particular transactions, if the other side were permitted to give in evidence declarations made by him respecting those transactions at variance with his testimony, without first calling the attention of the witness to those declarations, and refreshing his memory with regard to them, it would, as it has been observed, have an unfair effect upon his credit. Accordingly, it is the practice of the courts to ask a witness, whether he has held such a conversation, or made such a declaration, and such previous question is considered a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side, and if the party has neglected to lay this foundation, the court will in its discretion recal the witness for that purpose. *The Queen's case*, 2 *Br. & Bingh.* 301. The rule is thus laid down by Tindal, C. J., "I understand the rule to be, that before you can contradict a witness by showing that he has, at some other time, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that upon the general question he may not remember having so said, whereas when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said." *Angus* v. *Smith*, *Moo. & Mal.* 474. Where the witness merely says, that he does not recollect making the statements, evidence to prove that he did in fact make the statements is inadmissible; there must be an express denial. *Per Tindal, C. J.*, *Pain* v. *Beeston*, 1 *Moo. & Rob.* 20. But where a witness was asked as to a statement, which he neither admitted nor denied, Parke, B., held, that evidence of the statement was admissible, observing, "If the rule were not so, you could never contradict a witness who said he could not remember." The evidence, however, was withdrawn. *Crowley* v. *Page*, 7 *C. & P.* 791.

With regard to contradicting a witness by the production of a letter or other document written by himself at a previous time, the rule is thus laid down in *The Queen's case*, 2 *Br. & Bingh.* 287 (see also *Macdonnell* v. *Evans*, 11 *C. B.* 935, *ante*, p. 168): Upon cross-examination, counsel cannot be allowed to represent, in the statement of a question, the contents of a letter, and to ask a witness whether he wrote a letter to any person with such contents, or contents to the like effect, unless the letter is first shown to the witness, and he is asked whether he ever wrote such a letter, and he admits that he did write it. But a witness may be asked on cross-examination, upon showing him only a part, or one or more lines of such a letter, whether he wrote such part, or such one or more lines; but if he should not admit that he wrote such part or such lines, he cannot be examined to the effect of the contents of the letter, unless it be shown to him, and he admits the contents. In the regular course of pro-

ceeding, the letter ought to be read after the cross-examining counsel has opened his case, but if it is stated to be necessary for the purpose of propounding further questions in the course of the cross-examination, the court will permit the letter to be read at once, subject to all the consequences of having such letter considered as part of his evidence. *The Queen's case*, 2 *Br. & Bingh.* 290.

The rule above laid down for cross-examining a witness, as to the contents of a letter or other written paper, is applicable, at the furthest, only to a case in which the writing is supposed to be in existence. * * * If, therefore, a letter written by the witness is proved to have been lost or destroyed (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the letter), then it would be reasonable and proper to allow the counsel to cross-examine the witness as to the contents of such letter. 2 *Phill. Ev.* 439, *9th ed.*

With regard to the examination of a witness who, upon cross-examination, has been examined touching the declarations formerly made by him, respecting the matters upon which he has given evidence, it cannot be carried further than those declarations so inquired into, and the whole of the conversation which took place, cannot be entered into. The rule is thus laid down by Abbott, C. J., in *The Queen's case*, 2 *Br. & Bingh.* 298: "The conversation of a *third person* with the witness is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all that had constituted the motive and inducement, and all that may show the meaning of the words and declarations, have been laid before the court, the court becomes possessed of all that can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent."

If that which the witness has stated in answer to the question on his cross-examination, arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in the re-examination, what those inquiries were. He may also be asked what induced him to give to that person the account which he has stated in the cross-examination. 2 *Br. & Bingh.* 224.

Proof of former declarations in support of credit of witness.] Whether it is competent to the party whose witness has been attacked on cross-examination, to give in evidence former declarations of the witness, to the same effect as his testimony for the purpose of corroborating the latter, has been much controverted. In several cases such evidence was admitted upon the examination of the witness in chief. *Lutterell* v. *Reynell*, 1 *Mod.* 282; *Sir John Friend's case*, 13 *How. St. Tr.* 32. See also *Harrison's case*, 12 *How. St. Tr.* 861. So it is laid down by Gilbert, C. B., that though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony, to show that he affirmed the same thing on other occasions, and that he is still consistent with himself; for such evidence is only in support of the witness who gives in his testimony upon oath. *Gib. Ev.* 150, *4th ed.* And Hawkins states the rule to be, that what a witness has been heard to say at another time, may be given in evidence, in order either to *confirm* or invalidate the testimony which he gives in court. *Hawk. P. C. b.* 2, *c.* 46, *s.* 48. These writers were followed by Mr. Justice Buller, in his treatise on

the law of nisi prius, citing the case of *Lutterell* v. *Reynell*, *B. N. P.* 294; but he seems afterwards to have changed his opinion.

The first case in which this evidence appears to have been rejected, is *Parker's case*, 3 *Dougl.* 242, which was a prosecution for perjury, tried before Eyre, B. For the prosecution the depositions of a deceased person were given in evidence, and upon the cross-examination of one of the prosecutor's witnesses, certain declarations of the deceased person, not on oath, were proved, for the purpose of corroborating some facts in the deposition material to the prisoner; Eyre, B., rejected the evidence of those declarations, and the court of King's Bench, on a motion for a new trial, held the rejection proper. Buller, J., said that the evidence was clearly inadmissible, not being upon oath: that it was now settled, that what a witness said, not upon oath, could not be admitted to confirm what he had said upon oath, and that the case of *Luttrell* v. *Reynell*, and the passage cited from *Hawkins*, were not now law. *Parker's case*, 3 *Dougl.* 244. This case was referred to by Lord Redesdale in the *Berkeley Peerage case*, where his lordship gave his opinion in conformity with that decision. Lord Eldon also expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause, but thought that the question might be asked by the House. In conformity with these latter decisions, the rule is laid down by Mr. Phillipps with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 2 *Phill. Ev.* 445, 9*th ed.* So it is said by Sir W. D. Evans, "If a witness speaks to facts negativing the existence of a contract, and insinuations are thrown out that he has a near connexion with the party on whose behalf he appears, that a change of market, or any other alteration of circumstances, has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony, that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have had, if the motives for receding from a previous intention never had existed. Upon accusation for rape, where the forbearing to mention the circumstance for a considerable time, is itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection." *Notes to Potier on Oblig.* vol. ii. p. 251.

PRIVILEGED COMMUNICATIONS.

General rule.] ALTHOUGH a witness is sworn to speak the truth, the *whole* truth, and nothing but the truth, yet there are certain matters which he is not only not bound to disclose, but which it is his duty, even under the obligation of an oath not to disclose. Where a communication takes place between a counsel or an attorney, and his client, or between government and some of its agents, such communication is privileged, on the ground that, should it be suffered to be disclosed, the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy. But the rule does not extend beyond the two classes of persons above mentioned, whatever obligation of concealment the party may have incurred.

What persons are privileged—husband and wife.] "No husband shall be compellable to disclose any communication made to him by his wife during marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage." 16 & 17 Vict. c. 83, s. 3. See *ante*, p. 141.

What persons are privileged—professional advisers.] Except in the case of matters of state, the privilege of not disclosing confidential communications is confined to counsel, solicitors, attorneys, and their agents and clerks. *Wilson* v. *Rastall*, 4 *T. R.* 758, 759; *Duchess of Kingston's case*, 11 *St. Tr.* 243, *fo. ed.*, 20 *How. St. Tr.* 575. Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege. *Ibid.* Thus where the prisoner, being a Roman Catholic, made a confession, before a protestant clergyman, of the crime for which he was indicted, that confession was permitted to be given in evidence at the trial, and he was convicted and executed. *Sparke's case*, cited *Peake, N. P. C.*

78. Upon this case being cited, Lord Kenyon observed, that he should have paused before he admitted the evidence; but there appears to be no ground for this doubt. In *Gilham's case, Ry. & M. C. C. R.* 198, it was admitted by the counsel for the prisoner, that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and the prisoner in that case was convicted and executed.

A person who acts as interpreter between a client and his attorney, will not be permitted to divulge what passed; for what passed through the medium of an interpreter is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversation between the interpreter and the client in the absence of the attorney. *Du Barré* v. *Livette, Peake, N. P. C.* 77, 4 *T. R.* 756. 20 *How. St. Tr.* 575 (*n*). So the agent of the attorney stands in the same situation as the attorney himself. *Parkins* v. *Hawkshaw*, 2 *Stark. N. P. C.* 239. *Goodall* v. *Little*, 20 *L. J. Ch.* 132. So a clerk to the attorney. *Taylor* v. *Forster*, 2 *C. & P.* 195. *R.* v. *Inhabitants of Upper Boddington*, 8 *D. & R.* 732. So a barrister's clerk. *Foote* v. *Hayne, Ry. & Moo.* 165.

The privilege is that of the client, and not of the attorney; and the courts will prevent the latter, although willing, from making the disclosure. *Bull, N. P.* 284. *Wilson* v. *Rastall*, 4 *T. R.* 759. See the arguments in *Annesley's case*, 17 *How. St. Tr.* 1224, 1225. But if the attorney of one of the parties is called by his client and examined as to a matter of confidential communication, he may be cross-examined as to that matter, though not as to others. *Vaillant* v. *Dodemead*, 2 *Atk.* 524. If an attorney has communicated the contents of a document, such secondary evidence would be admissible, if the original were not produced at the trial. *Cleave* v. *Jones*, 21 *L. J. Ex.* 106.

The rule applies not only to the professional advisers of the parties in the case, but also to the professional advisers of strangers to the inquiry. Thus an attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. *Wither's case*, 2 *Camph.* 578. But a person, though by profession an attorney, if not employed in the particular business which is the subject of inquiry, is not precluded from giving evidence, though he may have been consulted confidentially. Thus where a prisoner in custody for felony, who was not even allowed to see his wife, wrote to a friend "to ask Mr. G., or some other solicitor, whether the punishment was the same, whether the names forged were those of real or fictitious persons;" Park, J., held that this was not a privileged communication, Mr. G. not being the prisoner's attorney. *Brewer's case*, 6 *C. & P.* 363; and see 4 *T. R.* 753. 5 *C. & P.* 436. So where a person, not being an attorney, is consulted by another, under a false impression that he is such, he will not be privileged from disclosing what passes. *Fountain* v. *Young*, 6 *Esp.* 113. So an attorney is not privileged from disclosing matters communicated to him before his retainer, or after it has ceased, for then he stands clearly in the same situation as any other person. *Bull, N. P.* 284. Where an attorney was employed to put in suit a note, and after the suit was settled the client told him that he knew it was a lottery transaction, the attorney, in an action to recover the money, was allowed to give evidence of this conversation. The court said that the purpose in view (in employing the attorney) had been already obtained, and what was said by

the client was in exultation to his attorney, on having before deceived him as well as his adversary. *Cobden* v. *Kenrick*, 4 *T. R.* 431. "This communication," observes Lord Brougham, in commenting on the case, "was not made professionally, but by way of idle and useless conversation; had the matter been confided with a view to some future proceedings, or, without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected." *Greenough* v. *Gaskell*, 1 *Mylne & K.* 109.

A judge is bound to decide the preliminary question of fact, whether a communication is privileged or not, and his decision, if erroneous, may be reviewed. *Cleave* v. *Jones*, 7 *Exch.* 421; *S. C.* 21 *L. J. Exch.* 105.

What matters are privileged.] Although some doubt has been entertained, as to the extent to which matters communicated to a barrister or an attorney in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted, by Lord Tenterden, to the latter cases only; see *Clark* v. *Clark*, 1 *Moody, & Rob.* 4; *William* v. *Munday, Ry. & Moo.* 34; yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. See all the cases commented upon by the L. C. in *Greenough* v. *Gaskell*, 1 *Myl. & K.* 100. See also *Walker* v. *Wildman*, 6 *Madd.* 47; *Mynn* v. *Joliffe*, 1 *Moo. & Ry.* 326; *Moore* v. *Tyrrell*, 4 *B. & Ad.* 870.

A communication made to a solicitor, if confidential, is privileged in whatever form made, and equally when conveyed by means of sight instead of words. Thus an attorney cannot give evidence as to the destruction of an instrument, which he has been admitted in confidence, to see destroyed. *Robson* v. *Kemp*, 5 *Esp.* 54. See *post*, p. 180.

What matters are privileged—production of deeds, &c.] A communication in writing is privileged, as well as a communication by parol; and deeds and other writings deposited with an attorney in his professional capacity, will not be allowed to be produced by him.

To prove the contents of a deed, the defendant's counsel offered a copy, which had been procured from the attorney of a party under whom the plaintiff claimed, but Bayley, J., refused to admit it. He said, "The attorney could not have given evidence of the contents of the deed, which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or a verbal communication. It is the privilege of his client, and continues from first to last." *Fisher* v. *Heming*, 1809. 1 *Phill. Ev.* 170, 9*th ed.* But see *Cleave* v. *Jones*, 21 *L. J. Ex.* 106, *supra*, and *Lloyd* v. *Mostyn*, 10 *M. & W.* 481, 482, where Parke, B., questions the correctness of the decision in *Fisher* v. *Heming*. In *Volant* v. *Soyer*, 13 *C. B.* 231; *S. C.* 12 *Law, J. C. P.* 83, an attorney refused to produce a document on the ground that it was his client's title deed; he was then asked what the deed was, but the judge disallowed the question, and refused also to examine the deed; the court held, that he was right. Nor where an attorney holds a document for a client can he be compelled to produce it, by a person who has an equal interest in it with his client. *Newton* v. *Chaplin*, 10 *C. B.* 356.

What matters are not privileged—matters of fact.] Where the subject inquired into is a collateral matter of *fact*, which the party setting up the privilege, obtained a knowledge of in his individual capacity, and not in his character of professional adviser, he will be compelled to disclose it. Thus an attorney, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a razure in a deed or bond, he may be asked whether he ever saw the instrument in another state, that being a fact within his own knowledge; but he ought not to be permitted to discover any confession which his client may have made to him on that head. *B. N. P.* 284. It has been said that the above case applies only where the attorney has his knowledge independently of any communication with his client. *Wheatley* v. *Williams*, 1 *M. & W.* 533. It was there held, that an attorney is not compellable to state whether a document shown to him by his client during a professional interview, was in the same state as when produced at the trial, namely, whether it was stamped or not. In *Dwyer* v. *Collins*, 7 *Exch.* 639; *S. C.* 21 *L. J. Ex.* 225, it was held, that the right of an attorney to disclose matters with which he has become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them; and that upon this ground an attorney of a party to a suit, is bound to answer on a trial, whether a particular document belonging to his client is in his possession, and is then in court. See also *Coates* v. *Birch*, 2 *Q. B.* 252. The clerk of an attorney may be called to identify a party, though he has only become acquainted with him in his professional capacity; for it is a fact cognisable both by the witness and by others, without any confidence being reposed in him. *Studdy* v. *Saunders*, 2 *Dow. & Ry.* 347; though the contrary was, upon one occasion, ruled by Mr. Justice Holroyd. *Parkins* v. *Hawkshaw*, 2 *Stark. N. P. C.* 240. So an attorney's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. *Eicke* v. *Nokes*, *Moo. & M.* 304. So an attorney conducting a cause may be called and asked who employed him, in order to let in the declarations of that person as the real party. *Levy* v. *Pope*, *Moo. & M.* 410. So he may prove that his client is in possession of a particular document, in order to let in secondary evidence of its contents. *Bevan* v. *Waters*, *M. & M.* 235. So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action; *Hurd* v. *Moring*, 1 *C. & P.* 372; *Robson* v. *Kemp*, 5 *Esp.* 52. So where an attorney is present when his client is sworn to an answer in chancery, on an indictment for perjury he will, it is said, be a good witness to prove the fact of the taking of the oath, for it is not a matter of secrecy committed to him by his client. *Bull, N. P.* 214. But in *Watkinson's case*, 2 *Str.* 1122, where the solicitor on a similar indictment was called to speak to the identity of the defendant's person, the Chief Justice would not compel him to be sworn, "*Quære tamen?*" says the reporter; "for it was a fact within his own knowledge." And Lord Brougham, in commenting upon this case, in *Greenough* v. *Gaskell*, 1 *Myl. & K.* 108, observes, that the putting in of the answer, so far from being a secret, was in its very nature a matter of publicity, and that the case cannot be considered as law at the present day.

Where a communication is made to an attorney, not for the pur-

pose of obtaining his legal opinion and advice, but in order to procure information upon a point, which might be as well obtained from an unprofessional person, the rule as to privilege does not apply. Thus where a trader asked his attorney, whether he could safely attend a meeting of his creditors, and the attorney advised him to remain at his office, it was held, that this communication was not privileged, for that it was made by the attorney upon a matter of fact, in the character merely of agent or friend. *Bramwell* v. *Lucas*, 2 *B. & C.* 745. The exception in question is well illustrated in the following case: In ejectment by *Mr. Annesley* against the *Earl of Anglesea*, one *Giffard*, who had been twenty years professionally employed by the Earl of Anglesea, was called to prove a conversation which he had had with that nobleman, respecting a prosecution against Mr. Annesley for murder, from which it would appear that the Earl privately took an active part in the prosecution, in order that Mr. A. might be hanged, and himself freed from his claims to the estate. The court admitted the evidence; and Bowes, C. B., after stating the general rule, said, "Does it follow from thence that everything said by a client to his attorney falls under the same reason? I own I think not; because there is not the same necessity upon the client to trust him in one case as in the other, and of this the court may judge, from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be interested in one case as an attorney and agent, and in another as a common acquaintance. In the first case the court will not permit him, though willing, to disclose what came to his knowledge as an attorney, because it would be a breach of that trust which the law supposes to be necessary between him and his employer; but where the client talks to him at large, as a friend, and not in the way of his profession, the court is not under the same obligation to guard such secrets, though in the breast of an attorney. *Annesley* v. *Earl of Anglesea, Trial at the bar of the Court of Exchequer in Ireland;* 17 *How. St. Tr.* 1217, 1239; *M'Nally, Ev.* 241.

So where in *the Duchess of Kingston's case*, 20 *How. St. Tr.* 613, the attorney of Lord Bristol was called, and asked what passed between himself and a witness on whom he had called, to procure him to attend and prove the marriage; upon his demurring to the question, Lord Mansfield said, this was no secret of his client, but a collateral fact, *viz.* what the witness had told him on the application, and he was directed to answer the question. See also *Plunkett* v. *Cobbett*, 5 *Esp.* 136, *post*, p. 186, and *Sykes* v. *Dunbar*, 2 *Selw. N. P.* 1004.

Where an act is done in pursuance of a bargain between two parties, and in presence of the attorney for each of them, the communication by one party to his attorney, relating to that act, is not privileged so as to prevent the attorney from giving evidence of it. *Weeks* v. *Argent*, 16 *M. & W.* 817; *S. C.* 16 *L. J. Exch.* 209. Parke, B., in that case, says, "The communication is made in the presence of a third party; how, then, can it be privileged?" "If a party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney." *Per* Parke, B., in *Perry* v. *Smith*, 9 *M. & W.* 683.

What matters are not privileged—attorney party to transaction.] Another exception to the rule of privileged communications is, where

the attorney is so far himself a party to the transaction, that the communications may be supposed to be made to him in that character, and not in the character of professional adviser. Thus where on a question whether there had been usury in giving a bond, the defendant called the plaintiff's attorney, to prove that the consideration of the bond was usurious; on this being objected to, Lord Kenyon said, that the privilege did not extend to this case, for that where the attorney is as it were a party to the original transaction, *that* does not come to his knowledge in the character of attorney, and that he is liable to be examined the same as any other person. *Duffin* v. *Smith*, *Peake*, *N. P. C.* 108. So it seems that every one, whether counsel, attorney, or other person, is bound to divulge matters communicated with a view to the *perpetration* of a crime. It has, therefore, been held in Scotland, that an agent who would otherwise be privileged, may be compelled to swear to his client's having declared his purpose to commit the crime to him; or that he undertook a criminal employment by his desire, as in the case of forgery, by falsifying a deed, the copy of which was sent to him by his employer. *Alison's Prac. Cr. L. S.* 473. The facts of the following case appear almost to bring it within the above rule, but the decision was the other way. In a prosecution for the forgery of a promissory note, the attorney who had the note in his possession, refused to produce it. He stated that he had been consulted by the prisoner on the note in question, and that by his directions he had commenced an action against the person in whose name it was forged. The attorney was not employed for the prosecution, and a demand of the note had been made upon him by the prisoner's attorney. Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it to the clerk of arraigns, and a true bill having been found, he likewise held that the attorney was not bound to produce it at the trial. *Smith's case, Derby Sum. Ass.* 1822. 1 *Phill. Ev.* 171, *9th ed.*

But where on an indictment for forging a will, an attorney employed by a party to put out money on mortgage, was applied to by the prisoner to procure him money on mortgage, and the prisoner produced a forged will in proof of his title to certain freehold lands, upon the security of which the attorney's other client, advanced the money, the mortgage deeds being prepared by the attorney; and the prisoner's counsel objected to the attorney being examined, and cited *Smith's case, supra*; Patteson, J., said he thought that case was not law, and that the attorney might be examined to show what was the transaction between the parties, and what led to that transaction; but said he would reserve the point for the consideration of the judges, if he should afterwards think it necessary to do so. The attorney was accordingly examined, and produced the will, which the learned judge thought he was bound to do. The prisoner was found guilty, but no sentence was passed, he having pleaded guilty to another indictment charging the transaction as a false pretence. *Avery's case*, 8 *C. & P.* 596. In *Tuff's case*, 1 *Den. C. C. R.* 334, Patteson, J., said, "The observations which I am reported to have made about *R.* v. *Smith*, seem too strong. I should have reserved the case of *R.* v. *Avery*, had not the prisoner pleaded guilty to another indictment, and so rendered it needless to press that farther." In *Farley's case*, 1 *Den. C. C. R.* 197, where the wife of a prisoner took a forged will to an attorney at the prisoner's request, and asked if he could advance her husband some money upon the mortgage of property mentioned in the will; it was held, that this was not a pri-

vileged communication. So where a forged will was put into an attorney's hands not in professional confidence, but that by finding it among the title deeds of the deceased, which the prisoner sent with the will, he might be disposed to act upon it; it was held by all the judges, that the communication was not privileged. *John Jones's case*, 1 *Den. C. C. R.* 166.

What other persons are privileged—grand jurors.] It does not appear to be completely settled, whether a grand juryman is at liberty to disclose the evidence laid before the grand jury in a criminal proceeding. *Phill. Ev.* 893, *8th ed.* Lord Kenyon allowed a grand juryman to be called to prove who was the prosecutor of an indictment, being of opinion that it was a fact the disclosure of which did not infringe upon his oath. *Sykes* v. *Dunbar*, 2 *Selw. N. P.* 1004. The court of King's Bench refused to receive an affidavit from a grand juryman, as to the number of grand jurors who concurred in finding the bill. *Marsh's case*, 6 *A. & E.* 236. So where a grand jury returned an indictment containing ten counts, indorsed, "a true bill on both counts," and the prisoner pleaded to the whole ten counts; Patteson, J. (the grand jurors having been discharged), would not allow one of them to be called as a witness to explain their finding. *Cooke's case*, 8 *C. & P.* 582.

Matters before grand jury.] In *Watson's case*, a witness was questioned by the prisoner's counsel, as to his having produced and read a certain writing before the grand jury. On this being objected to, Lord Ellenborough, C. J., said, "he had considerable doubts upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer." The question was not repeated. 32 *How. St. Tr.* 107. But it has since been held, that a witness for the prosecution in a case of felony, may be asked on cross-examination, whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. *Gibson's case*, *Carr. & M.* 672. See also *Russell's case*, *Carr. and M.* 247.

According to an old case, a clerk attending before a grand jury shall not be compelled to reveal what was given in evidence. *Trials per pais*, 220; 12 *Vin. Ab.* 38; *Evidence* (*B. a.* 5). Where a bill of indictment was prefered for perjury committed at the quarter sessions, and it was proposed to examine one of the grand jury who had acted as chairman at such sessions; Patteson, J., said, "This is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." *Gazard's case*, 8 *C. & P.* 595.

What other persons are privileged—judges and jurors.] It is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges appointed to try him. 2 *Hawk. P. C. c.* 46. *s.* 17. *Bac. Ab. Evid.* (*A.* 2). In *Hacker's case*, two of the persons in the commission for the trial, came off the bench and were sworn, and gave evidence, and did not go up to the bench again during his trial. *Kel.* 12; *Sid.* 153.

A juror may give evidence of any fact material to be communi-

cated in the course of a trial, but then he must be sworn, *ante*, p. 124; 3 *Com.* 375. In a criminal prosecution the jury may use that general knowledge which any man may bring to the subject-matter of the indictment without being sworn; but if any one of the jurors has a particular knowledge on the subject arising from being in the trade; as for instance, as to the value of a watch in a case where it is essential to prove what it is worth, he ought to be sworn and examined as a witness. *Rosser's case*, 7 *C. & P.* 648.

What other matters are privileged—disclosures by informers, &c.] Another class of privileged communications are those disclosures which are made by informers, or persons employed for the purpose, to the government, the magistracy, or the police, with the object of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre, C. J.: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case." *Hardy's case*, 24 *How. St. Tr.* 808. It is not of course every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government, is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. *Watson's case*, 2 *Stark. N. P. C.* 136. So a person employed by an officer of the executive government, to collect information at a meeting supposed to be held for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connexion between them. *Hardy's case*, 24 *How. St. Tr.* 753; *Watson's case, Gurney's Rep.* 159, 32 *How. St. Tr.* 100.

The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice. A witness who had given information, admitted on a trial for high treason, that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering in the negative, he was asked who was the friend? It was objected, that the person by whose advice the information was given to one standing in the situation of magistrate, was in fact the informer, and that his name could not be disclosed. The judges differed. Eyre, C. J., Hotham, B., and Grose, J., thought the question objectionable; Macdonald, C. B., and Buller, J., were of opinion it should be admitted. Eyre, C. J., said, "Those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the

general principle of the convenience of public justice. It is no more competent to ask who the person was that advised the witness to make a disclosure, than it is to ask to whom he made the disclosure in consequence of that advice; or than it is to ask any other question respecting the channel of information, or what was done under it." Hotham, B., said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald, C. B., said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; and the opinion of Buller, J., was founded on the same reason. *Hardy's case*, 24 *How. St. Tr.* 811. The above cases were cited and considered in *The Attorney-General* v. *Briant*, 15 *M. & W.* 169, where the court decided, that upon the trial of an information for a breach of the revenue laws, a witness for the crown cannot be asked in cross-examination, "Did you give the information?"

What matters are privileged—official communications.] Upon the same principle it has been held, that communications between the governor and law officers of a colony, *Wyatt* v. *Gore*, *Holt, N. P. C.* 299, between the governor of a colony and one of the secretaries of state, *Anderson* v. *Hamilton*, 2 *Br. & Bingh.* 156, between a governor of a colony and a military officer, *Cooke* v. *Maxwell*, 2 *Stark.* 183, are privileged. In the latter case the communication was in writing, and Bayley, J., said, "If the document cannot on principles of public policy be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but that what was done, was done by the orders of the defendant."

But where the information has been given, not to the government, or to any person connected with the administration of justice, nor to any other for the purpose of being conveyed to such person, a disclosure of the circumstances attending it may be required. See the opinion of *Macdonald, C. B., and Buller, J., Hardy's case, supra.*

So communications, though made to official persons, are not privileged so as to justify the exclusion of the evidence, where they are not made in the discharge of any public duty; as, for instance, a letter from a private individual to the secretary of the postmaster general, complaining of the conduct of the guard of a mail. *Blake* v. *Pilfold*, 1 *Moo. & R.* 198.

What matters are privileged—matters of state.] Matters communicated confidentially, in furtherance of the administration of justice, are, as it has been stated, privileged from disclosure; and upon the same grounds, matters of state, as official communications, between different members or officers of government receive a like protection. Some cases of this kind have been already mentioned; *ante*, p 184. So where on a trial for high treason, Lord Grenville was called upon to produce a letter intercepted at the post-office, and which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his Majesty's confidential subjects. *Case cited by Lord Ellenborough, Anderson* v. *Hamilton*, 2 *Br. & Bingh.* 157 (*n*). What passes in parliament is in the same manner

privileged. Thus on a trial for a libel upon Mr. Plunkett, a member of the Irish parliament, the speaker of the Irish house of commons being called and asked, whether he had heard Mr. Plunkett deliver his sentiments in parliament on matters of a public nature; Lord Ellenborough said that the speaker was warranted in refusing to disclose what had taken place in a debate in the house of commons. He *might* disclose what passed there, and if he thought fit to do so, he should receive it as evidence. As to the fact of Mr. Plunkett having spoken in parliament, or taken any part in the debate, he was bound to answer. That was *a fact* containing no improper disclosure of any matter. *Plunkett* v. *Cobbett*, 5 *Esp.* 136; 29 *How St. Tr.* 71, 72, *S. C.* On the same ground, *viz.* that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of the prisoner, was accurate. *Watson's case*, 2 *Stark. N. P. C.* 148.

The two following cases, however, are at variance with the rule above stated: Upon the trial of Lord Strafford, the confidential advice given by that nobleman to the king, at the council table, was allowed to be disclosed, and given in evidence against him. *Strafford's case*, 1 *St. Tr.* 723, *fo. ed.* And in the case of *the Seven Bishops*, 4 *St. Tr.* 346, *fo. ed.*, the clerk of the privy council was compelled to state what passed at the council-board, and even what the king himself said, although the counsel for the crown objected to it. However, in *Sayer's case*, 6 *St. Tr.* 288, *fo. ed.*, it seems to have been considered, that minutes taken before the privy council were not to be divulged, and it cannot be doubted that, at the present day, the practice adopted in the case of Lord Strafford and of the Seven Bishops would be overruled, as contrary to the principles of the law of evidence and injurious to the public interests.

What matters are privileged—where oath of office has been taken not to divulge.] Where for revenue or other purposes, an oath of office has been taken not to divulge matters which have come to the knowledge of a party in his official capacity, he will not be allowed, where the interests of justice are concerned, to withold his testimony. Thus where the clerk to the commissioners of the property tax being called to produce the books containing the appointment of a party as collector, objected on the ground that he had been sworn not to disclose any thing he should learn in his capacity of clerk, Lord Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpœna*. He added that the witness must produce the books, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. *Lee. q. t. v. Birrell*, 3 *Camp.* 337.

DOCUMENTARY EVIDENCE.

The 8 & 9 Vict. c. 113.] By this statute (E. & I.) for facilitating the admission in evidence of certain official and other documents, it is enacted (s. 1), "that whenever by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding; the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or

stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

By s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster; provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

By s. 3, "All copies of private and local, and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown, or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

Sec. 4, after enacting (see *post Forgery*) that persons who forge such seals, stamps, or signatures as above-mentioned, or who print any private acts or journals of parliament with false purport, are guilty of felony, further provides, "that whenever any such document as before mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised at its, or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court, or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the person or persons who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose."

The 14 *&* 15 *Vict. c.* 99.] By this statute (E. & I.) it is enacted by s. 7, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state, or British colony, to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document, filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed by the judge; or if there be more than one judge, by any

one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy, that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed, as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

By s. 8, "Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence, in any court of justice, and before any person having by law, or by consent of parties having authority to hear, receive, and examine evidence, without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been, from the date of the said certificate, duly qualified to practise as an apothecary in any part of England or Wales."

By s. 9, "Every document which by any law now in force, or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purpose, in any court of justice in Ireland, or before any person having in Ireland by law, or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

By s. 10, "Every document which by any law now in force, or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purpose, in any court of justice in England or Wales, or before any person having in England or Wales by law, or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authorising the same, or of the judicial or official character of the person appearing to have signed the same."

By s. 11, "Every document which by any law now in force, or hereafter to be in force, is or shall be, admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purpose, in any court of justice of any of the British colonies, or before any person having, in any such colonies by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

And after reciting that it is expedient, as far as possible, to reduce the expense attending upon the proof of criminal proceedings, it is enacted:—

By s. 13, "That whenever, in any proceedings whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

By s. 14, "Whenever any book or other document is of such public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice or before any person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

By s. 15, "If any officer authorised or required by this act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable upon conviction to imprisonment for any term not exceeding eighteen months."

By s. 16, "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

By s. 17, "If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years, nor less than one year with hard labour, and whenever such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as the said court or person shall see meet; and every person who shall be charged with committing any felony under this act, or under the act 8 & 9 Vict. c. 113, may be dealt with, indicted, tried and, if convicted, sentenced, and his offence may be laid and charged to have been committed in

the county, district, or place in which he shall be apprehended or be in custody; and every accessary, before or after the fact, to any such offence may be dealt with, indicted, tried and, if convicted, sentenced, and his offence laid and charged to have been committed in any county, district, or place in which the principal offender may be tried."

14 & 15 *Vict.* c. 100.] Sec. 22 of this statute enacts that "A certificate containing the substance and effect only (omitting the personal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of 6*s.* 8*d.*, and no more, shall be demanded or taken), shall, upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same."

Proof of acts of parliament, &c.] The courts will take notice of public acts of parliament, without their being specially proved; but previously to the 8 & 9 Vict. c. 113, private acts of parliament must have been proved by a copy examined with the parliament roll, *B. N. P.* 225, unless the mode of proof were provided for by the act. Where there was a clause in the act, declaring that it should be taken to be a public act, and should be taken notice of as such by all judges, &c., without being specially pleaded, it was not necessary to prove a copy examined with the roll, or a copy printed by the king's printer, but it stood upon the same footing as a public act. *Beaumont* v. *Mountain*, 10 *Bingh.* 404; *Woodward* v. *Cotton*, 4 *Tyr.* 689; 1 *C., M. & R.* 44; see also *Forman* v. *Dawes*, *Carr. & M.* 127. If for other purposes, however, as with regard to the recital of facts contained in it, such a clause did not give the statute the effect of a public act. *Brett* v. *Beales*, *Moo. & M.* 421.

Every act of parliament is now deemed to be a public act, and is to be judicially noticed as such, unless the contrary be expressly declared; 13 & 14 Vict. c. 21, s. 7.

By the 41 Geo. 3, c. 90, s. 9, the statutes of England and (since the union with Scotland) of Great Britain, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made in the parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

Formerly the journals of the lords and commons must have been proved by examined copies. *Lord Melville's case*, 24 *How. St. Tr.* 683; *Lord G. Gordon's case*, 2 *Dougl.* 593; but now see 8 & 9 Vict. c. 113, *ante*, p. 187.

A record is not complete until delivered into court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute book, are neither a record nor in the nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. *Bellamy's case*, *Ry. & Moo.* 172. And where to prove an indictment for felony found by the grand jury, the indictment

itself (which was in another court) indorsed "a true bill," was produced by the clerk of the peace, together with the minute book of the proceedings of the sessions at which the indictment was found, the Court of King's Bench held, that in order to prove the indictment it was necessary to have the record regularly drawn up, and that it should be proved by an examined copy. *Smith's case*, 8 *B. & C.* 341. *Cooke* v. *Maxwell*, 2 *Stark*. 183. So an allegation that the grand jury at sessions found a true bill, is not proved by the production of the bill itself with an indorsement upon it, but a record regularly made up must be produced. *Porter* v. *Cooper*, 6 *C. & P.* 354; 4 *Tyr.* 456; 1 *C., M. & R.* 388, *S. C.* So it has been ruled on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made up on parchment. *Ward's case*, 6 *C. & P.* 366; and see *Reg.* v. *the Inhabitants of Pembridge*, *Carr. & M.* 157. But where the object of the evidence was merely to prove the fact of a former trial, it was held on an indictment for perjury committed at such trial that the production by the officer of the court, of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon, was sufficient, without the production of the record, or a certificate of the same, under 13 & 14 Vict. c. 99, s. 3. *Newman's case*, 2 *Den. C. C. R.* 390; *S. C.* 21 *L. J. M. C.* 75. So a judgment on paper signed by the master is not evidence, for it is not yet become permanent. *B. N. P.* 228. *Godefroy* v. *Jay*, 1 *M. & P.* 236; 3 *C. & P.* 192, *S. C.* In one case the minutes of the Lord Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction. *Fisher* v *Lane*, 2 *W. Bl.* 834; 8 *B. & C.* 342.

The mode of examination usually adopted, is for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. *Reid* v. *Margison*, 1 *Camp.* 469; *Gyles* v. *Hill*, *Id.* 471 (*n*). It must appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept. *Adamthwaite* v. *Synge*, 1 *Stark.* 183; 4 *Camph.* 572, *S. C.*

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.* 1 *Ventr.* 256; *B. N. P.* 228.

With respect to the proof of records before courts of criminal justice, as where a prisoner pleads *autrefois acquit* to an indictment, he may remove the record by *certiorari* into chancery, and have it exemplified; but it seems to be the usual practice for the clerk of assizes or clerk of the peace to make up the record without writ, or to attend with it at the trial. 2 *Russ. by Grea.* 806 (*n*); 1 *Phill. Ev.* 141, *9th ed.*

Proof by office copies, and copies by authorised officers, &c.] An office copy is not evidence of the original, if the latter be in another court. Thus office copies of depositions in chancery are evidence in chancery, but not at common law, without examination with the roll. *B. N. P.* 229; 5 *M. & S.* 38. In a court of common law, an office copy has been held sufficient in the same court, and in the same cause. *Dean* v. *Fulford*, 2 *Burr.* 1179. And so it seems that an issue out of chancery may be considered as a proceeding in that court, and an office copy would probably be held evidence there. See *Highfield* v. *Peake*, *Moo. & Mal.* 111. There appears to be no reason for distinguishing

between the effect of office copies in different causes in the same court, the principle of the admissibility being, that the court will give credit to the acts of its own officers; and accordingly it was held in one case, that an office copy made in another cause in the same court, was admissible. *Wightwick* v. *Banks*, *Forrest*, 154.

Where there is a known officer, whose duty it is to deliver out copies which form part of the title of the parties receiving them, and whose duty is not performed till the copy is delivered, as in the case of the chirograph of a fine, and the inrolment of a deed, such copies are evidence, without proof of examination with the originals. See *Appleton* v. *Lord Braybrooke*, 6 *M.* & *S.* 37.

By the 5 & 6 Wm. 4, c. 82, the offices of chirographer, &c., are abolished, but the copies, &c., made by the officer of the C. P. now substituted, are by sec. 4 made as available in evidence as they would by law have been, if made by the former officers.

The certificate of the inrolment of a deed pursuant to the statute is a record and cannot be averred against. *Hopper's case*, 3 *Price*, 495. A copy of a judgment purporting to be examined by the clerk of the treasury (who is not intrusted to make copies), is not admissible without proof of examination with the original. *B. N. P.* 229. A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. *Hill* v. *Halford*, 4 *Campb.* 17. Office copies of rules of court, being made out by officers of the court in the execution of their duty, are sufficient evidence without being proved to have been examined. *Selby* v. *Harris*, 1 *Ld. Raym.* 745; *Duncan* v. *Scott*, 1 *Campb.* 102. And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. *Dance* v. *Robson*, *Moo.* & *M.* 294. Copies of records, in the custody of the master of the rolls, under the 1 & 2 Vict. c. 94, purporting to be sealed and stamped with the seal of the record office, are, by s. 13, made evidence without further proof. As to the rejection of copies of accounts returned by the supreme court at Madras to the Q. B., see *Reg.* v. *Douglas*, 1 *C.* & *K.* 670. As to office copies being rejected for containing abbreviations, see *Reg.* v. *Christian*, *Carr.* & *M.* 388.

Proof of inquisitions.] Inquisitions *post mortem* and other private offices cannot be read in evidence without proof of the commission upon which they are founded, unless, as it seems, the inquisition be old (*Vin. Ab. Ev. A. b.* 42); but in cases of more general concern, as the minister's return to the commission in Henry the Eighth's time, to inquire into the value of livings, the commission is a thing of such public notoriety that it requires no proof. *Per Hardw.*, *C.*, *in Sir H. Smithson's case*, *B. N. P.* 228. An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 Ed. 1, will be presumed to have been taken under a competent authority, though the commission cannot be found. *Rowe* v. *Brenton*, 8 *B.* & *C.* 747.

Proof of verdicts.] The mode of proving a verdict depends upon the purpose for which it is produced. Where it is offered in evidence, merely to prove that such a cause came on for trial, the *postea* with the verdict indorsed is sufficient. *Pitton* v. *Walter*, 1 *Str.* 162. So it is sufficient to introduce an account of what a witness, who is since

dead, swore at a trial. *Per Pratt, C. J., Id.* So upon an indictment for perjury, committed by a witness in a cause, the *postea*, with a minute by the officer, of the verdict having been given, is sufficient to prove that the cause came on for trial. *Browne's case, Moo. & M.* 315. But without such minute, the nisi prius record is no evidence of the case having come on for trial. *Per Lord Tenterden, Id.* In London and Westminster, it is not the practice for the officer to indorse the *postea* itself as in the country, but the minute is indorsed on the jury pannel. *Id.*

But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered upon the record, and that judgment thereupon has also been entered on record, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. *Fisher* v. *Kitchenham, Willes*, 368; *Pitton* v. *Walter*, 1 *Str.* 162; *B. N. P.* 243. In one case, indeed, Abbott, J., admitted the *postea* as evidence of the amount recovered by the verdict; *Foster* v. *Compton*, 2 *Stark.* 364; and Lord Kenyon also ruled that it was sufficient proof to support a plea of set-off, to the extent of the verdict; *Garland* v. *Schoones*, 2 *Esp.* 648; but these decisions appear to be questionable. An allegation in an indictment for perjury that judgment was "entered up" in an action, is proved by the production of the book from the judgment office, in which the *incipitur* is entered. *Gordon's case, Carr. & M.* 410. Where an indictment for perjury against A. alleged that B. was convicted on an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record, when produced, that B. had been convicted, but the judgment against him had been reversed upon error, after the finding of the present indictment; it was held that the record produced supported the indictment. *Meek's case*, 9 *C. & P.* 513. Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record; but where the writ itself is the gist of the action, a copy of the writ on record must be proved in the same manner as any other record. *B. N. P.* 234.

Proof of affidavits made in causes.] In what manner an affidavit filed in the course of a cause is to be proved, does not appear to be well settled. In an action for a malicious prosecution, an examined copy had been admitted. *Crook* v. *Dowling*, 3 *Dougl.* 72, but see *Rees* v. *Bowen, M'Cl. & Y.* 383. A distinction had been taken between cases where the copy is required to be proved in a civil suit, and where it forms the foundation of a criminal proceeding, as upon an indictment for perjury. In *James's case*, 1 *Show.* 327; *Carth.* 220, *S. C.*, the defendant was convicted of perjury upon proof of a copy of an affidavit; it was urged that it was only a copy, and that there was no proof that it had been made by the defendant; but it appearing that it had been made use of by the defendant in the course of the cause, the court held it sufficient. This case was however doubted in *Crook* v. *Dowling*, 3 *Dougl.* 77, where Lord Mansfield said that on indictments for perjury he thought the original should be produced. Buller, J., also observed that wherever identity is in question, the original must be produced. *Id.* 77. The same rule is laid down with regard to the proof of answers in chancery upon indictments for perjury. *Vide post*, p. 195. It may be doubted how far the distinction in question has any foundation in principle, the

rules of evidence with regard to the proof of documents being the same in civil and in criminal cases, and the *consequences* of the evidence not being a correct test of the *nature* of the evidence.

Proof of proceedings in equity.] A bill or answer in chancery, when produced in evidence for the purpose of showing that such proceedings have taken place, or for the purpose of proving the admissions made by the defendant in his answer, may be proved either by production of the original bill, or answer, or by an examined copy, with evidence of the identity of the parties. *Hennell* v. *Lyon*, 1 *B. & A.* 182; *Ewer* v. *Ambrose*, 4 *B. & C.* 25. But a distinction is taken where the answer is offered in evidence in a criminal proceeding, as upon an indictment for perjury, in which case it has been said to be necessary, that the answer itself should be produced, and positive proof given by a witness acquainted with him, that the defendant was sworn to it. *Chambers* v. *Robinson*, *B. N. P.* 239; *Lady Dartmouth* v. *Roberts*, 16 *East*, 340. In order to prove that the answer was sworn by the defendant, it is sufficient to prove his signature to it, and that of the master in chancery before whom it purports to be sworn. *Benson's case*, 2 *Campb.* 508; *Morris's case*, *B. N. P.* 239; 2 *Burr.* 1189, *S. C.*

A decree in chancery may be proved by an exemplification, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer, or without such proof, if the bill and answer be recited in the decretal order. *B. N. P.* 241. *Com. Dig. Testm.* (*C.* 1.) With regard to the proof of the previous proceedings, the correct rule appears to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as that *a decree* was made by the court,) he ought regularly to give in evidence the proceedings on which the decree is founded. *Phill. Ev.* 619; *8th ed.* See *Blower* v. *Hollis*, 3 *Tyr.* 351; 1 *C. & M.* 393.

As t[illegible]e admissibility of decrees in equity, see 6 *M. & W.* 234.

Proof of depositions.] The depositions of witnesses, who are since dead, may, when admissible, be proved by the judge's notes, or by notes taken by any other person who can swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given. *Per Mansfield, C. J.*, *Mayor of Doncaster* v. *Day*, 3 *Taunt.* 262.

Where depositions in chancery are offered in evidence, merely for the purpose of proving a fact admitted in them, or of contradicting a witness, it is not necessary to give evidence of the bill and answer. But where it is necessary to show that they were made in the course of a judicial proceeding, as upon an indictment for perjury in the deponent, proof of the bill and answer will be required. But the judge only is to look at them for the purpose of determining whether the depositions sought to be put in are evidence. *Chappell* v. *Purday*, 14 *M. & W.* 303. Where the suit is so ancient that no bill or answer can be found, the depositions may be read without proof of them. Depositions taken by command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read. *Lord Hunsdon* v. *Lady Arundell*, *Hob.* 112, *B. N. P.* 240. So depositions taken in 1686 were allowed to be read without such proof; *Byam* v. *Booth*, 2 *Price*, 234; and answers to old interrogatories were searched for and not found. *Rowe* v. *Brenton*, 8 *B. & C.* 765. But, in general, depositions taken upon

interrogatories under a commission cannot be read without proof of the commission. *Bayley* v. *Wylie*, 6 *Esp.* 85.

Proof of proceedings in bankruptcy.] Formerly proceedings on commissions of bankrupt were proved, either by producing the proceedings themselves duly enrolled (6 Geo. 4, c. 16, s. 96), or where the original instrument was filed in the office, or was officially in the custody of the secretary of the Lord Chancellor, by copies duly signed and attested. (6 Geo. 4, c. 16, s. 97.) Now, by the 12 & 13 Vict. c. 106, "any fiat, petition for adjudication of bankruptcy, adjudication of bankruptcy, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition, or other proceedings or order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and in behalf of all persons, and whether for the purposes of the act or otherwise, be admitted into all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place, or been made and be deemed respectively records of the court without any further proof thereof; and no such document or copy shall be receivable as evidence unless the same appear to be so sealed, except where otherwise specially provided." The only important documents not requiring a seal under this section are copies of declaration of insolvency and of minutes of resolutions where arrangements have been made between debtors and their creditors under the control of the court; and provided these documents respectively purport to be certified by the Chief Registrar of the Court of Bankruptcy, or any of his clerks, as true copies, they are receivable as evidence of such declarations or minutes of resolutions having been filed in the office of the Chief Registrar. (15 & 16 Vict. c. 77, ss. 2, 6.) If the declaration of insolvency has been filed, as it may be in a country district, a copy purporting to be certified by the registrar of the district is now receivable as evidence by virtue of the Bankruptcy Act, 1854 (17 & 18 Vict. c. 119, ss. 16, 17, 19). *Taylor, Ev.* 1198, *2nd edit.*

Proof of proceedings of the insolvent courts.] By the 1 & 2 Vict. c. 110, s. 46, a copy of the order of assignment of the insolvent's property to the provisional assignee, and of the appointment of the assignees of the estate and effects, made upon parchment, purporting to have the certificate of the provisional assignee, or his deputy appointed for that purpose, indorsed upon it, and sealed with the seal of the court, is evidence of such order and appointment and of the title of the assignees in all courts and places.

By s. 105, a copy of the petition, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer having the custody of them, or his deputy, certifying the same to be a true copy, and sealed with the seal of the court, is admissible in evidence in the same manner. And by the 5 & 6 Vict. c. 116, s. 11, the like evidence of the appointment of assignees under that act shall be received as sufficient to prove such appointments as is received by the laws now in force relating to bankrupts. By the 7 & 8 Vict. c. 96, s. 37, a petition for protection from process, and any proceeding in the matter of it, purporting to be signed by a commissioner of bankruptcy, or copies thereof, are receivable in evidence of such proceedings having

taken place. By s. 23 of the Small Debts' Act, 8 & 9 Vict. c. 127, the provisions of this act are made applicable to the latter statute.

The provisions of the foregoing acts do not take away the right to

Proof of judgments and proceedings of inferior courts.] The judgments and proceedings of inferior courts, not of record, may be proved by the minute book in which the proceedings are entered, as in the case of a judgment in the county court. *Chandler* v. *Roberts*, *Peake, Ev.* 80, *5th ed.* So an examined copy of the minutes will be sufficient. *Per Holt, C. J., Comb.* 337; 12 *Vin. Ab. Evid. A. pl.* 26. If the proceedings of the inferior court are not entered in the books, they may be proved by the officer of the court, or by some person conversant with the fact. See *Dyson* v. *Wood*, 3 *B. & C.* 451, 453.

Proof of records and proceedings in county courts.] It is enacted by the 9 & 10 Vict. c. 95, s. 111, "that the clerk of every court holden under this act shall cause a note of all plaints and summonses, and of all orders and of all judgments and executions and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding without any further proof." Under this section it has been decided that such minutes of proceedings cannot be contradicted by the evidence of the judge. *Dews* v. *Ryley*, 20 *L. J. C. P.* 264.

Proof of probates and letters of administration.] The probate of a will is proved by the production of the instrument itself; and proof of the seal of the court is not necessary. In order to prove the title of the executor to personal property, the probate must be given in evidence. *Pinney* v. *Pinney*, 8 *B. & C.* 335. When the probate is lost it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd* v. *Shorthose*, 1 *Str.* 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence. *Ramsbotham's case*, 1 *Leach*, 30 (*n*), *3rd ed.*

Administration is proved by the production of the letters of administration granted by the Ecclesiastical Court. *Kempton* v. *Cross*, *Rep. temp. Hardw.* 108. *B. N. P.* 246. So the original book of acts of that court directing the granting the letters is evidence. *B. N. P.* 246. And an examined copy of such act book is also evidence. *Davis* v. *Williams*, 13 *East*, 232.

Proof of foreign laws.] The written law of a foreign state must be proved by a copy of the law properly authenticated. *Boehtlinck* v. *Schneider*, 3 *Esp.* 58; *Clegg* v. *Levy*, 3 *Campb.* 166. It does not seem necessary that the copy should have been examined with the

original. See cases *post*, tit. *Bigamy*. The unwritten law of a foreign state (having first been ascertained to be part of the unwritten law by witnesses professionally conversant with the laws of the state) may be proved by the parol evidence of witnesses possessing competent legal skill. *Millar* v. *Heinrick*, 4 *Campb.* 155. The witness to prove a foreign law must be a person *peritus virtute officii*, or *virtute professionis*. A roman catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage case*, 11 *Cla. & Fin.* 85; 1 *C. & K.* 213. Such a witness may refer to foreign law-books to refresh his memory or to correct and confirm his opinion, but the law itself must be taken from his evidence.

A judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary is shown. *Alivon* v. *Furnival*, 14 *Tyr.* 757; 1 *C., M. & R.* 277.

Proof of public books and documents.] Wherever the contents of a public book or document are admissible in evidence, as such, examined copies are likewise evidence, as in the case of registers of marriages, deaths, &c.; as are likewise *certified* copies under the 14 & 15 Vict. c. 99, s. 14; *ante*, *p.* 190. Thus an examined copy of an order in council is sufficient, without the production of the council books themselves. *Eyre* v. *Palsgrave*, 2 *Campb.* 606. So copies of the transfer books of the East India Company; *Anon.* 2 *Dougl.* 593 (*n*); and of the Bank of England; *Marsh* v. *Collnett*, 1 *Esp.* 665; *Bretton* v. *Cope*, *Peake*, *N. P. C.* 30; of a bank note filed at the bank; *Mann* v. *Cary*, 3 *Salk.* 155; so the books of commissioners of land-tax; *King's case*, 2 *T. R.* 234; or of excise; *Fuller* v. *Fotch*, *Carth.* 346; or of a poll-book at elections; *Mead* v. *Robinson*, *Willes*, 424 In one case the copy of an agreement contained in one of the books in the Bodleian Library (which cannot be removed) was allowed to be read in evidence. *Downes* v. *Moreman*, *Bunb.* 189; 2 *Gwill.* 659. The books of the King's Bench and Fleet prisons, when they are admissible, are not such public documents that a copy of them may be given in evidence, for they are not kept by any public authority. *Salte* v. *Thomas*, 3 *B. & P.* 190.

Corporation books may be given in evidence, as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence. *Mothersell's case*, 1 *Str.* 93. But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. *Id.* An examined copy of a corporate book is evidence. *Brocas* v. *Mayor of London*, 1 *Str.* 308; *Gwyn's case*, 1 *Str.* 401. It is not settled whether the attesting witness of a corporation deed need be called; *Doe* v. *Chambers*, 4 *A. & E.* 410; or whether such a deed proves itself after thirty years. *Rex* v. *Bathwick*, 2 *B. & Ad.* 648. Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. *Heydon's case*, 1 *W. Bl.* 351; *Purnell's case*, *Id.* 37; 1 *Willes*, 239; 2 *Str.* 1210.

Proof of public registers.] Public registers, as of births, marriages,

or deaths, are proved either by the production of the register itself or of an examined copy. *B. N. P.* 247. Parol evidence of the contents of a register has been admitted; yet the propriety of such evidence, says Buller, may well be doubted, because it is not the best evidence the nature of the case is capable of. *B. N. P.* 247. A copy of a record or of a public book is not, in fact, secondary evidence; and therefore the opinion of Mr. Justice Buller appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of persons who were present. Thus, upon an indictment for bigamy, it was held sufficient to prove the marriage, by the evidence of a person who was present at it, without proving the registration, license, or banns. *Alison's case, Russ. & Ry.* 109.

In proving a register, some evidence of the identity of the parties must be given, as by proof of the handwriting, for which purpose it is not necessary to call the subscribing witnesses. *Per Lord Mansfield, Birt* v. *Barlow*, 1 *Dougl.* 174. The identity is usually established by calling the minister, clerk, or some other person who was present at the ceremony.

In *Nash's case*, 2 *Den. C. C. R.* 493, *S. C.* 21 *L. J. M. C.* 147, upon an indictment for forging and uttering a transfer of shares in a railway company, it was held that the register of shareholders, kept under the 8 & 9 Vict. c. 16, s. 9, was evidence to prove that an individual was a shareholder without any authentication of the seal, and that in order to sustain the indictment it was unnecessary to give further proof that such individual was a shareholder of the company.

By the 52 Geo. 3, c. 146 (which is still in force for the registration of births and burials by clergymen of the church of England), it is provided that verified copies shall be annually sent to the registrar of the diocese. It seems that such verified copies being public documents, are evidence as well as the originals, and may be proved by examined copies. *Per Alderson, B., Walker* v. *Beauchamp*, 6 *C. & P.* 552. But it is otherwise of the returns enjoined by the canons of 1603, which can only be used as secondary evidence. *S. C.* By the 6 & 7 Wm. 4, c. 86, s. 38, for registering births, marriages, and deaths in England, certified copies of entries purporting to be sealed or stamped with the seal of the office of the registrar-general, shall be evidence of the birth, death, or marriage to which they relate, without further proof of such entries. By the 3 & 4 Vict. c. 92, certain non-parochial registers of births, marriages, and deaths, transferred to the general register office, or certified extracts therefrom, are made admissible in evidence; but in criminal cases the original registers must (by s. 17) be produced. And see further as to examined and certified copies, 14 & 15 Vict. c. 99, s. 14; *ante*, p. 190.

As to marriage registers in Ireland, see the 7 & 8 Vict. c. 81.

For the act amending the law of marriages, see *post*, *Bigamy*.

Proof of ancient documents, terriers, &c.] In many cases, ancient documents are admitted in evidence, to establish facts which, had they been recently made, they would not have been allowed to prove. These documents prove themselves, provided it appear that they are produced out of the proper custody. The proper repository of ecclesiastical terriers or maps is the registry of the bishop or archdeacon of the diocese. *Atkins* v. *Hatton*, 2 *Anst.* 387; *Potts* v. *Durant*, 3 *Anstr.* 795. On an issue to try the boundaries of two parishes,

an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any person bearing a public character or office in the parish. *Earl* v. *Lewis*, 4 *Esp.* 3.

So also with regard to private ancient documents, it must appear that they came from the custody of some person connected with the property. Thus, where upon an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence, J., the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. *Swinnerton* v. *Marquis of Stafford*, 3 *Taunt.* 91. So a grant to the abbey of Glastonbury, contained in an ancient MS., deposited in the Bodleian Library, entitled *Secretum Abbatis*, was rejected, as not coming from the proper repository. *Mitchell* v. *Rabbets, cited Id.* See also *Barber's case*, 1 *C. & K.* 434.

Proof of seals.] Where necessary, a seal must be proved by some one acquainted with it, but it is not requisite to call a witness who saw it affixed. *Moises* v. *Thornton*, 8 *T. R.* 307. Some seals, as that of London, require no proof. *Doe* v. *Mason*, 1 *Esp.* 53. So the seal of the superior ecclesiastical courts, and other superior courts, *ante*, *p.* 189. But the seal of a foreign court must be shown to be genuine. *Henry* v. *Adey*, 3 *East*, 221. So of the Bank of England. *Semb.* *Doe* v. *Chambers*, 4 *A. & E.* 410. So of the apothecaries' company. *Chadwick* v. *Bunning*, *R. & Moo.* 306.

For the provisions of the 8 & 9 Vict. c. 113, dispensing with proof of the seals of corporations, joint stock or other companies, further extended by 14 & 15 Vict. c. 99, see *ante*, *p.* 187, 188.

Although the seal need not be shown to be affixed by the proper person, yet the deed may be invalidated by proof of the seal being affixed by a stranger, or without proper authority. *Clarke* v. *Imperial Gas Co.*, 4 *B. & Ad.* 315.

Proof of private documents—attesting witness.] The execution of a private document, which has been attested by a witness subscribing it, must be proved by calling that witness, although the document may not be such as by law is required to have the attestation of a witness. Thus, if a warrant of distress has been attested, the attesting witness must be produced. *Higgs* v. *Dixon*, 2 *Stark.* 180.

Proof of private documents—attesting witness—when proof waived.] Where the attesting witness is dead; *Anon.* 12 *Mod.* 607; or blind; *Wood* v. *Drury*, 1 *Lord Raym.* 734; *Pedley* v. *Paige*, 1 *Moo. & Rob.* 258; or insane; *Currie* v. *Child*, 3 *Camph.* 283; or infamous; (but now see the 6 & 7 Vict. c. 85, s. 1, *ante*, *p.* 129); *Jones* v. *Mason*, 2 *Str.* 833; or absent in a foreign country, or not amenable to the process of the superior courts; *Prince* v. *Blackburn*, 2 *East*, 252; as in Ireland; *Hodnett* v. *Foreman*, 1 *Stark.* 90; or where he cannot be found, after diligent inquiry; *Cunliffe* v. *Sefton*, 2 *East*, 183; in all these cases evidence of the attesting witness's handwriting is admissible. Some evidence must be given in these cases of the identity of the executing party; and although there are cases to the contrary, it is now held that mere identity of name is not sufficient

proof of the identity of the party. *Whitelock* v. *Musgrave*, 1 *Crom. & Mee.* 511 ; 3 *Tyr.* 541, *S. C.* The illness of a witness, although he lies without hope of recovery, is no sufficient ground for letting in evidence of his handwriting. *Harrison* v. *Blades*, 3 *Campb.* 457. Where the name of a fictitious witness is inserted ; *Fasset* v. *Brown*, *Peake*, 23 ; or where the attesting witness denies all knowledge of the execution ; *Talbot* v. *Hodgson*, 7 *Taunt.* 251 ; *Fitzgerald* v. *Elsee*, 2 *Campb.* 635 ; evidence of the handwriting of the party is sufficient proof of its execution. So where an attesting witness subscribes his name without the knowledge or consent of the parties. *M'Craw* v. *Gentry*, 3 *Campb.* 232. Where there are two attesting witnesses, and one of them cannot be produced, being dead, &c., it is not sufficient to prove his handwriting, but the other witness must be called. *Cunliffe* v. *Sefton*, 2 *East*, 183 ; *M'Craw* v. *Gentry*, 3 *Campb.* 232. But if neither can be produced, proof of the handwriting of one only is sufficient. *Adam* v. *Kerr*, 1 *B. & P.* 360.

Proof of private documents—evidence of handwriting.] Where a party cannot sign his name, but makes his mark, that mark may be proved by a person who has seen him make the mark, and is acquainted with it. *Per Tindal, C. J., hæsitante*, *George* v. *Surrey*, *Moo. & M.* 516. Where a witness had seen the party execute a bail-bond, but had never seen him write his name on any other occasion, and stated that the signature to the bond produced, was like the handwriting which he saw subscribed, but that he had no belief on the subject, this was held to be evidence of the handwriting to go to the jury. *Garrells* v. *Alexander*, 4 *Esp.* 37. But it is otherwise, where the witness has only seen the party write his name once, and then for the purpose of making the witness competent to give evidence in the suit. *Stranger* v. *Searle*, 1 *Esp.* 14. Where the witness stated that he had only seen the party upon one occasion sign his name to an instrument, to which he was attesting witness, and that he was unable to form an opinion as to the handwriting, without inspecting that other instrument, his evidence was held inadmissible. *Filliter* v. *Minchin*, *Mann. Index*, 131. In another case, under similar circumstances, Dallas, J., allowed a witness to refresh his memory, by referring to the original document, which he had formerly seen signed. *Burr* v. *Harper*, *N. P. C.* 420. It is sufficient, if the witness has seen the party write his surname only. *Lewis* v. *Sapio*, *Moo. & Mal.* 39 ; overruling *Powell* v. *Ford*, 2 *Stark.* 164.

It is not essential to the proof of handwriting, that the witness should have seen the party write. There are various other modes in which he may become acquainted with the handwriting. Thus, where a witness for the defendant stated that he had never seen the person in question write, but that his name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signature, so as to form an opinion which enabled him to say he believed the handwriting in question was genuine, this was held by Park, J., to be sufficient. *Smith* v. *Sainsbury*, 5 *C. & P.* 196. So where letters are sent, directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. *Per Lord Kenyon*, *Cary* v. *Pitt*, *Peake*, *Ev. App.* 86. And in general, if a witness has received letters from the party in question, and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting. *Thorpe* v.

Gilburne, 2 *C.* & *P.* 21. And the receipt of letters, although the witness has never done any act upon them, has been held sufficient. *Doe* v. *Wallinger*, *Mann. Index*, 131. In general, a document cannot, in criminal cases, be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine. See *Burr* v. *Harper*, *Holt*, 421. But in the case of ancient documents, where it is impossible that the usual proof of handwriting can be given, the rule as to comparison of hands does not apply. *B. N. P.* 236. Thus authentic ancient writings may be put into the hands of a witness, and he may be asked whether, upon a comparison of those, with the document in question, he believes the latter to be genuine. *Doe* v. *Tarver*, *Ry.* & *Moo. N. P. C.* 142; 7 *East*, 282.

The rule as to comparison of handwriting does not apply to the *court* or the *jury*, who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting. *Griffiths* v. *Williams*, 1 *Cr.* & *J.* 47; *Solita* v. *Yarrow*, 1 *Moo.* & *R.* 133. But the document with which the comparison is made must be one already in evidence in the case, and not produced merely for the purposes of the comparison. Thus, where upon an indictment for sending a threatening letter, in order to prove the handwriting to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, Bolland, B., after considering *Griffiths* v. *Williams*, rejected the evidence, observing, that to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. *Morgan's case*, 1 *Moo.* & *Rob.* 134 (*n*). See also *Bromage* v. *Rice*, 7 *C.* & *P.* 548; *Doe* v. *Newton*, 5 *A.* & *E.* 514, 534; *Griffiths* v. *Ivery*, 11 *A.* & *E.* 322; *Hughes* v. *Rogers*, 8 *M.* & *W.* 123, and *Younge* v. *Honner*, 1 *C.* & *K.* 751.

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *R.* v. *Longnor*, 4 *B.* & *Ad.* 647. In such case the subscription of the name by the agent, and his authority to subscribe it, must be proved.

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled. Such evidence was admitted in one case. *Goodtitle* v. *Braham*, 4 *Tr.* 497. But in a subsequent case, Lord Kenyon, who had presided in the case of *Goodtitle* v. *Braham*, rejected similar evidence. *Cary* v. *Pitt*, *Peake*, *Ev. App.* lxxxv. It was admitted again by Hotham, B. (*Cator's case*, 4 *Esp.* 117); and again rejected in *Gurney* v. *Langlands*, 5 *B.* & *A.* 330. Upon the point coming before the court of K. B., in the last-cited case, they refused to disturb the verdict, on the ground of the evidence having been rejected. In a recent case the court of K. B. was equally divided on the question whether, after the witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the attesting witness. *Doe* v. *Suckermore*, 5 *A.* & *E.* 703; 2 *N.* & *P.* 16.

Proof of execution, when dispensed with.] When a deed is thirty years old it proves itself, and no evidence of its execution is necessary. *B. N. P.* 255; *Doe* v. *Burdett*, 4 *A.* & *E.* 19. And so with regard to a steward's books of account if they come from the proper custody; *Wynne* v. *Tyrwhitt*, 4 *B.* & *A.* 376; letters; *Beer* v. *Ward*, *Phill. Ev.* 652, 8*th ed.*; a will produced from the ecclesiastical court; *Doe* v. *Lloyd*, *Peake*, *Ev. App.* 91; a bond; *Chelsea W. W.* v. *Cooper*, 1 *Esp.* 275; and other old writings; *Fry* v. *Wood*, *Selw. N. P.* 517 (*n*). Even if it appear that the attesting witness is alive, and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Doe* v. *Woolley*, 8 *B.* & *C.* 22. If there is any rasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness, if living, or by proof of his handwriting, and that of the party, if dead. *B. N. P.* 255. But perhaps this is in strictness only necessary where the alteration on the face of it is material or suspicious. Where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; *B. N. P.* 255; or it should be shown that possession has accompanied it. *Gilb. Ev.* 97.

Where a party producing a deed upon a notice to produce, claims a beneficial interest under it, the party calling for the deed need not prove its execution. *Pearce* v. *Hooper*, 3 *Taunt.* 62. As where assignees produce the assignment of the bankrupt's effects. *Orr* v. *Morice*, 3 *B.* & *B.* 139. See also *Carr* v. *Burdiss*, 5 *Tyrwh.* 136; 1 *C., M.* & *R.* 782; *Doe* v. *Wainwright*, 5 *A.* & *E.* 520. But it must be an interest in the subject-matter of the cause; *Rearden* v. *Minter*, 5 *M.* & *Gr.* 204; *Collins* v. *Bayntum*, 1 *Q. B.* 117; and it must be still subsisting at the time of the trial; *Fuller* v. *Patrick*, 18 *L. J. Q. B.* 236. So in an action against the vendor of an estate, to recover a deposit in a contract for the purchase, if the defendant on notice produces the contract; Lord Tenterden, C. J., held that the plaintiff need not prove its execution. *Bradshaw* v. *Bennett*, 1 *Moo.* & *R.* 143. So where in an action by a pitman against the owners of a colliery for wages due to him under an agreement usually called a pit bond, the defendants produced the agreement upon notice; Cresswell, J., held that it was unnecessary for the plaintiff to call the attesting witness. *Bell* v. *Chaytor*, *Durham Summ. Ass.* 1843, *MS.*; 1 *Carr.* & *K.* 162.

Where, however, a defendant, to prove that he had been in partnership with the plaintiffs, offered in evidence a written contract purporting to be made by the plaintiffs and the defendant as partners with K., a builder, for work to be done by K. upon the premises, where the plaintiffs carried on the business in which the defendant alleged himself to have been a partner, and the document was in the plaintiff's custody, produced by them on notice, it was held that the contract was not admissible as an instrument under which the plaintiffs claimed an interest without proof of the execution. *Collins* v. *Bayntum*, 1 *Q. B.* 117.

But where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon* v. *Secretan*, 8 *East*, 548; *Doe* v. *Cleveland*, 9 *B.* & *C.* 864. See further, *Rosc. N. P. Ev.* 94, *5th ed.*

Stamps.] Formerly, in criminal as well as in civil cases, a document, which by law is required to be stamped, could not be given in evidence without a stamp, unless, as in the cases after mentioned, the

instrument itself were the subject-matter of the offence. Thus, where upon an indictment for embezzlement, in order to prove the receipt of the money, evidence was tendered of an unstamped receipt for it, given by the prisoner, it was rejected by Bayley, J., *Hall's case*, 3 *Stark. N. P. C.* 67. But now, by the 17 & 18 Vict. c. 83, s. 37, "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto."

AIDERS, ACCESSARIES, &c.

UNDER this head will be considered the evidence against aiders, or principals in the second degree, against accessaries before the fact, and accessaries after the fact.

Proof with regard to aiders and abettors.] Although the law, on this subject, was formerly not well settled, it is now clear that all those who are present, aiding and abetting, where a felony is committed, are principals in the second degree. 1 *Russ. by Grea.* 26; *Coalheaver's case*, 1 *Leach*, 66; *Foster*, 428. With regard to the *nature* of the felony, it has been held that the rules with regard to principals in the second degree, apply equally to felonies created by statute, as to those offences which are felonies at common law. *Tattersall's case*, 1 *Russ. by Grea.* 27.

Proof with regard to aiders and abettors—what presence is sufficient to make a party a principal in the second degree.] With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said by Mr. Justice Foster, that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the act, others to watch at proper distances, to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged, they are all, provided the act be committed, in the eye of the law present at it. *Foster*, 350. Thus where A. waits under a window, while B. steals articles in the house, which he throws through the window to A., the latter is a principal in the offence. *Owen's case*, 1 *Moody, C. C.* 96, *stated post.* There must be a participation in the act, for although a man be present whilst a felony is committed, if he takes no part in it and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Foster*, 350. So a mere participation in the act, without

a felonious participation in the design, will not be sufficient. 1 *East, P. C.* 257; *Plumer's case, Kel.* 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale*, 466.

Where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers employed by the messenger of the secretary of state, to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony at all. Holt, C. J., observing upon this case, says, that they were all engaged in an unlawful act is plain; for they could not justify the breaking a man's house without first making a demand. Yet all those who were not guilty of stealing were acquitted, notwithstanding their being engaged in an unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance of opportunity of stealing, whereupon some of them did lay hands. *Anon.* 1 *Leach*, 7 (*n*), 1 *Russell by Grea.* 29. See also *White's case, R. & R.* 99; *Hawkin's case*, 3 *C. & P.* 392, *post.*

In felonies, either an actual presence, or such a presence as may be sufficient to afford aid and assistance to the principal in the first degree is necessary, in order to render a party guilty as a principal in the second degree. See *Soare's case, Russ. & Ry.* 25; *Davis's case, Id.* 113; *Badcock's case, Id.* 249; *King's case, Id.* 332; *M'Makin's case, Id.* 333 (*n*); *Kelly's case, Id.* 421; *Stewart's case, Id.* 363; but in misdemeanors an accessary before the fact, absent at the commission of the offence charged, may be indicted and convicted as a principal. *Greenwood's case*, 2 *Den. C. C. R.* 453, *S. C.* 21 *L. J. M. C.* 127.

A principal in the second degree in larceny, cannot be convicted on an indictment charging him as a receiver. *Perkins's case*, 2 *Den. C. C. R.* 459; *S. C.* 21 *L. J. M. C.* 152.

It has been long settled, that all those who are present, aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty. 2 *Hale*, 223, and may be convicted, though the party charged as principal in the first degree is acquitted. *Taylor's case*, 1 *Leach*, 360; *Benson* v. *Offley*, 2 *Show.* 510; 3 *Mod.* 121; *Wallis's case, Salk.* 334; *Towle's case, R. & R.* 314; 3 *Price*, 145; 2 *Marsh.* 465.

Proof with regard to accessaries before the fact.] An accessary before the fact, is defined by Lord Hale to be one who, being absent at the time of the offence committed, does yet procure, counsel, command or abet another to commit a felony. 1 *Hale, P. C.* 615. The bare concealment of a felony to be committed, will not make the party concealing it an accessary before the fact. 2 *Hawk. c.* 29, *s.* 23. So words amounting to a bare permission will not render a man an accessary, as if A. says he will kill J. S., and B. says "you may do your pleasure for me." *Hawk. P. C. b.* 2, *c.* 29, *s.* 16. The pro-

curement must be continuing; for if before the commission of the offence by the principal, the accessary countermands him, and yet the principal proceeds to the commission of the offence, he who commanded him will not be guilty as accessary. 1 *Hale, P. C.* 618. If the party was *present* when the offence was committed, he is not an accessary. *Gordon's case*, 1 *Leach*, 515; 1 *East, P. C.* 352. Several persons may be convicted on a joint charge against them as accessaries before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *Barber's case*, 1 *C. & K.* 442.

Proof with respect to accessaries before the fact—by the intervention of a third person.] A person may render himself an accessary by the intervention of a third person, without any direct communication between himself and the principal. Thus if A. bids his servant to hire somebody to murder B., and furnish him with money for that purpose, and the servant hires C., a person whom A. never saw or heard of, who commits the murder, A. is an accessary before the fact. *Macdaniel's case*, *Fost.* 125; *Hawk. P. C. b.* 2, *c.* 29, *ss.* 1, 11; 1 *Russ. by Grea.* 32; *Cooper's case*, 5 *C. & P.* 535.

Proof with regard to accessaries before the fact—degree of incitement.] Upon the subject of the degree of incitement and the force of persuasion used, no rule is laid down. That it was sufficient to effectuate the evil purpose is proved by the result. On principle, it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessary; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed, although the incitement had never taken place. 2 *Stark. Ev.* 8, *2nd ed.*

Proof with regard to accessaries before the fact—principal varying from orders given to him.] With regard to those cases where the principal varies, in committing the offence, from the command or advice of the accessary, the following rules are laid down by Sir Michael Foster. If the principal totally and substantially varies; if, being solicited to commit a felony of one kind, he *wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal *in substance* complies with the command, varying only in the circumstances of time, or place, or manner of execution, in these cases the person soliciting to the offence, will, if absent, be an accessary before the fact, or if present, a principal. A. commands B. to murder C. by poison; B. does it by sword or other weapon, or by some other means; A. is accessary to this murder, for the murder of C. was the principal object, and that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such order or advice, will be an accessary to that felony. A. upon some affront given by B. orders his servant to waylay him and beat him. The servant does so, and B. dies of the beating; A. is accessary to this murder. A. solicits B. to burn the house of C.; he does so, and the flames catching the house of D., that also is burnt. A. is an accessary to this felony.

The principle in all these cases is, that though the event might be beyond the original intention of the accessary, yet as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence. *Foster*, 369, 370; see also 1 *Hale*, *P. C.* 617; *Hawk. P. C. b.* 2, *c.* 29, *s.* 18. Where the principal *wilfully* commits a different crime from that which he is commanded or advised to commit, the party counselling him will not, as above stated, be guilty as accessary. But whether, where the principal *by mistake* commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Lord Hale, that if A. command B. to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C.; A. is not accessary to the murder of D., because it differs in the person. 1 *Hale*, *P. C.* 617, *citing* 3 *Inst.* 51; *Saunders's case*, *Plow. Com.* 475. The circumstances of *Saunders's case*, cited by Lord Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat, and the wife having eaten a small part of it, and given the remainder to their child, Saunders making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessary to the murder.

Upon the law as laid down by Lord Hale, and upon *Saunders's case*, Mr. Justice Foster has made the following observations, and has suggested this case: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B., answering the description, unhappily coming by, is murdered under a strong belief on the part of B., that he is the man marked out for destruction. Who is answerable? Undoubtedly A.: the malice on his part *egreditur personam*. The pit, which he, with a murderous intention, dug for C., D. fell into and perished. Through his guilt, B. not knowing the person of C., had no other guide to lead him to his prey than to the description of A., and in following this guide he fell into a mistake, which it is great odds any man in his circumstances might have fallen into. "I, therefore," continues the learned writer, "as at present advised, conceived that A. was answerable for the consequences of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." *Foster*, 370. With regard to *Archer's case*, the same learned author observes, that the judges did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal, but for example's sake, kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown. *Ibid.* 371. Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to rest. Did the principal commit the felony he stands charged with, under the flagitious advice, and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject. *Foster*, 372. See also *Hawk. P. C. b.* 2, *c.* 29, *s.* 22.

Proof with regard to accessaries before the fact—what offences admit of accessaries.] With regard to the particular offences which admit of accessaries, it is held that in high treason there can be no accessaries, but all are principals, every act of incitement, aid, or protection, which in felony would render a man an accessary before or after the fact, in the case of high treason (whether by common law or by statute), making him a principal. *Foster*, 341; 4 *Bl. Com.* 35. So in all offences below felony there can be no accessaries. 1 *Hale*, *P. C.* 613; 4 *Bl. Com.* 36; *Greenwood's case*, 2 *Den. C. C. R.* 453, *S. C.* 2[illegible]. *J. M. C.* [illegible]27. Also in manslaughter there can be no accessaries before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessary, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 347, 450, 616. It is said in the older books that in forgery all are principals; (see 2 *East, P. C.* 973;) but this must be understood of forgery at common law, which is a misdemeanor. *Id.*

Accessaries before the fact—trial and punishment.] Before the 7 Geo. 4, c. 64, accessaries could not be punished until the guilt of the principal offender was established. It was necessary, therefore, either to try them after the principal had been convicted, or upon the same indictment with him, and the latter was the usual course. 1 *Russell by Grea.* 38. By the 9th section of that statute, "if any person shall counsel, procure or command any other person to commit any felony, whether the same shall be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessary before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as an accessary before the fact to the same felony, if convicted as an accessary, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within his Majesty's dominions or without."

"And that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding, shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person, who shall be once duly tried for any such offence, whether as an accessary before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

Under this statute an accessary before the fact, indicted with his principal, was not bound to plead to the indictment if the latter did not appear. *Ashmall's case*, 9 *C. & P.* 237.

But now the 11 & 12 Vict. c. 46, s. 1, after reciting that it is

expedient that any accessary before the fact to felony, should be liable to be indicted, convicted, and punished in all respects like the principal, as is now the case in treason and in all misdemeanors, enacts, "that if any person shall become an accessary before the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

Since the passing of this enactment, in indicting a person for felony, it is immaterial whether he be a principal in the first or the second degree, or an accessary before the fact, as in either case he is indictable as a principal. *Manning's case*, 2 *C. & K.* 903.

Proof with regard to accessaries after the fact.] An accessary after the fact, says Lord Hale, is where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale, P. C.* 618; whether he be a principal, or an accessary before the fact. 2 *Hawk. c.* 29, *s.* 1; 3 *P. Wms.* 475. But a *feme covert* does not become an accessary by receiving her husband. This, however, is the only relationship which will excuse such an act, the husband being liable for receiving the wife. 1 *Hale, P. C.* 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessaries, in the same manner as a stranger would be. *Hawk. P. C. b.* 2, *c.* 29, *s.* 34. If a husband and wife knowingly receive a felon it shall be deemed to be the act of the husband only. 1 *Hale, P. C.* 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessary, and not the husband. *Id.*

With regard to the acts which will render a man guilty as an accessary after the fact, it is laid down, that generally, any assistance whatever, given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where any one harbours and conceals in his house a felon under pursuit, in consequence of which, his pursuers cannot find him; much more, where the party harbours a felon, and the pursuers dare not take him. *Hawk. P. C. b.* 2, *c.* 29, *s.* 26. See *Lee's case*, 6 *C. & P.* 536. So a man who employs another person to harbour the principal may be convicted as an accessary after the fact, although he himself did no act to relieve or assist the principal. *Jarvis's case*, 2 *Moo. & R.* 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessary. *Hawk. P. C. b.* 2, *c.* 29, *s.* 27. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaoler to let him escape, makes the party an accessary. But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime imputable to this species of accessary is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 *Bl. Com.* 38.

Merely suffering the principal to escape will not make the party an accessary after the fact, for it amounts at most but to a mere omission. 6 *H.* 4, *s.* 1; 1 *Hale*, 619. So if a person speak or write, in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst.* 139; 1 *Hale*, 620; or even if he

himself agree for money not to give evidence against the felon; *Moo.* 8; or know of the felony and do not discover it; 1 *Hale*, 371, 618; none of these acts will make a party an accessary after the fact.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessary. As if one wounded another mortally, and after the wound given, but before death ensued, a person assisted or removed the delinquent, this did not, at common law, make him accessary to the homicide, for till death ensued, there was no felony committed. *Hawk. P. C. b.* 2, *c.* 29, *s.* 35; 4 *Bl. Com.* 38.

In order to render a man guilty as accessary, he must have notice, either express or implied, of the principal having committed a felony. *Hawk. P. C. b.* 2, *c.* 29, *s.* 32. It was formerly considered, that the attainder of a felon, was a notice to all persons in the same county of the felony committed, but the justice of this rule has been denied. *Hawk. P. C. b.* 2, *c.* 29, *s.* 33. It was observed by Lord Hardwicke, that though this may be some evidence to a jury, of notice to an accessary in the same county, yet it cannot, with any reason or justice, create an absolute presumption of notice. *Burridge's case*, 3 *P. Wms.* 495. In order to support a charge of receiving, harbouring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen. *Chapple's case*, 9 *C. & P.* 355.

Accessaries after the fact—trial and punishment.] With regard to the trial of accessaries after the fact, the 7 Geo. 4, c. 64, s. 10, enacts, "that if any person shall become an accessary after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason whereof such person shall have become an accessary, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas, or at any place on land, whether within his majesty's dominions or without. And that in case the principal shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessary shall have been committed within the body of any other county, the offence of such accessary may be inquired of, tried, determined, and punished in either of such counties. Provided always, that no person who shall be once duly tried for any offence of being an accessary, shall be liable to be again indicted or tried for the same offence."

And by s. 11, "if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessary, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessary shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted."

And now the 11 & 12 Vict. c. 46, s. 2, after reciting that "whereas an accessary after the fact to felony can at present be tried only

along with the principal felon, or after the principal felon has been convicted, and not otherwise, which is sometimes productive of a failure of justice," enacts, "that if any person shall become an accessary after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, he may be indicted and convicted either as an accessary after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessary after the fact to the same felony, if convicted as an accessary, may be punished; and the offence of such principal, howsoever indicted, may be inquired of, tried, determined, and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason of which such person shall have become an accessary, had been committed at the same place as the principal felony; provided always that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

An accessary may avail himself of every matter, both of law and fact, to counteract the guilt of his principal. *Foster*, 365; 1 *Russ. by Grea.* 42; and see *post*, *Receiving Stolen Goods.*

In *Ratcliffe's case*, 1 *Lew.* 121, where an accessary before the fact to a murder was tried after the principal had been tried and executed, Parke, B., required the proceedings to be conducted in the same manner as if the principal was then on his trial; and the evidence against the accessary was not gone into until the case against the principal was concluded.

Under the 11 & 12 Vict. c. 46, s. 2, an accessary after the fact may be tried in the absence of the principal felon, and before the latter has been convicted, although the accessary be indicted in the ordinary way with the principal, and there is no count charging a substantive felony. *Per Erle, J., in Hansill's case*, 3 *Cox, C. C.* 597.

PRACTICE.

Preferring and finding bills of indictment.] Two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. *R.* v. *Doran*, 1 *Leach*, 538; *R.* v. *Smith*, 3 *C. & P.* 413. But where two indictments had been found, one for stealing and another for a misdemeanor, and it was sworn that they were for the same identical offence, the Q. B. (into which court the indictments had been removed by *certiorari*,) refused to grant a rule for quashing one or both of such indictments. *R.* v. *Stockley*, 3 *Q. B.* 328.

The grand jury should require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to documentary evidence; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist upon the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be provided, at the time the bill is preferred, with the same evidence which is intended afterwards to support the indictment.

Where the grand jury found, upon a bill preferred against A. and B. for murder, a true bill against A. for murder, and against B. for manslaughter, Campbell, C. J., held that the finding against A. was good, and that against B. a nullity, and directed that a fresh bill should be preferred against B. for manslaughter. *Bubb's case*, 4 *Cox, C. C.* 455. Where the grand jury have found a bill, the judge before whom the case comes on to be tried, ought not to inquire whether the witnesses were properly sworn previously to their going before the jury; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge only. *Russell's case, Carr. & M.* 247. Witnesses examined before grand juries are now sworn in the presence of the jurors. The 19 & 20 Vict. c. 54, enacts, that "it shall be lawful for the foreman of every grand jury empannelled in England and Wales, and he is hereby authorised and required to administer an oath to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence, may be sworn and examined upon oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment, who shall wilfully swear or affirm falsely, shall be deemed guilty of perjury; and the name of every witness examined, or intended to be so examined, shall be endorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness, so sworn and examined touching such bill of indictment: provided, however, that nothing in this act contained shall affect any fees by law payable to any officers of any court for swearing witnesses, but such fees shall remain payable as if this act had not passed."

As to the grand jury in Ireland, see the 1 & 2 Vict. c. 37; also *O'Connell* v. *Reg.* 11 *C. & F.* 155.

If the bill be not found, a fresh bill may afterwards be preferred to a subsequent grand jury, 4 *Bla. Comm.* 305. And it would seem from *Bacon's Abridgment, Indictment D.*, that where a bill for one offence, such as murder, is ignored by the grand jury, another bill against the same party, relating to the same subject-matter but charging another offence, such as manslaughter, may be preferred to and found by the same grand jury: and this course is frequently adopted in practice.

But if the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill at the same assizes or sessions, against the same person for precisely the same offence, and if such other bill be sent before them they should take no notice of it. *Humphreys's case, Carr. & M.* 601. Acc. *Austin's case*, 4 *Cox, C. C.* 386.

Where a true bill has been found by the grand jury at quarter sessions for a rape, the person against whom the bill is found may be tried upon it at the assizes. *Allum's case*, 2 *Cox, C. C.* 62.

Copy of indictment.] A prisoner is not entitled as of right to a copy of the indictment in order to draw up his plea, but the court will direct the indictment to be read over slowly, in order that it may be taken down. *Parry's case*, 7 *C. & P.* 836. But the counsel for the prosecution may give a copy of the indictment with a view of saving time. *Ib.* See also *Newton's case*, 1 *C. & K.* 469. In the case of an acquittal on a prosecution for felony, a copy of the indictment cannot

be regularly obtained without an order from the court. The rule is confined to cases of felony. In prosecutions for misdemeanors, the defendant is entitled to a copy of the record as a matter of right, without a previous application to the court. *Morrison* v. *Kelly*, 1 *Blackst.* 385; *Evans* v. *Phillips*, *MS.*; 2 *Selw. N. P.* 952; 2 *Phill. Ev.* 176. See further 2 *Russ. by Grea.* 812, 813.

Arraignment in general.] A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanors. 1 *Chitt. C. L.* 414; 4 *Bl. C.* 375. On an indictment or information for a crime *less than felony*, the defendant may, by favour of the court, appear by attorney, and this he may do as well before plea pleaded as afterwards unto conviction. *Bacon's case*, 1 *Lev.* 146; *Keilw.* 165. In all cases of felony, the prisoner must take his place within the dock. *Douglas's case*, *Car. & M.* 193; and see also *Zulucta's case*, 1 *C. & K.* 215.

The arraignment consists of three parts; the calling the prisoner to hold up his hand, the reading over the indictment to him, and the asking him whether he is guilty or not guilty. 2 *Hale*, 219. If the prisoner upon his arraignment refuse to answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. The court will in such case direct a jury to be impanelled, who are immediately returned, *Jones's case*, 1 *Leach*, 102, from amongst the by-standers, 1 *Chitty*, *C. L.* 424. The prisoner's counsel may address the jury and call witnesses, for the affirmative of the issue is on him. *Roberts's case*, *Carr. C. L.* 57. Where a verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if the prisoner is of competent intellect, and can be made to understand the nature of the proceedings against himself. Thus where it appeared that a prisoner who was found mute, had been in the habit of communicating by means of signs, and a witness was called who stated that he was capable of understanding her by means of signs, he was arraigned, put upon his trial, convicted of simple larceny, and received sentence of transportation. *Jones's case*, 1 *Leach*, 102; 1 *Russ. by Grea.* 7. So where a prisoner, who was found mute, could read and write, the indictment was handed to him with the usual questions written upon paper. After he had pleaded, and stated in writing he had no objection to any of the jury, the trial proceeded. The judge's note of the evidence was handed to him after the examination of each witness, and he was asked in writing if he had any question to put. The proof on the part of the prosecution being insufficient, he was acquitted without being called upon for his defence. *Thompson's case*, 2 *Lew. C. C.* 137.

So the jury having found that the prisoner was mute by visitation of God, and then, being sworn to try whether he was of sound mind, found that he was; his counsel pleaded not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the defendant. *Whitfield's case*, 3 *C. & K.* 121, *coram Williams, J.*

But where a prisoner is deaf and dumb, and cannot be made to comprehend the nature of the proceedings and the details of the evidence, the proper course seems, after the jury have found him mute by the visitation of God, to reswear the jury to inquire whether he is able to plead to the indictment; and if that be found in the affirmative, then to swear them again, to inquire if the prisoner be sane or not, and if the jury find him to be insane, the judge will order him to be

confined under the 39 & 40 Geo. 3, c. 94, s. 2, *post.* "There are three points to be inquired into. 1st. Whether the prisoner is mute of malice or not. 2nd. Whether he can plead to the indictment or not. 3rd. Whether he is of sufficient intellect to comprehend the course of proceedings at the trial so as to make a proper defence." *Per Alderson, B. Pritchard's case,* 7 *C. & P.* 303. See also *Dyson's case, ibid.* 305 (*n*).

If the prisoner stands mute of malice, or will not answer directly to the indictment, or information, (for treason, felony, piracy, or misdemeanor,) it is enacted by the 7 & 8 Geo. 4, c. 28, s. 2, that in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty," on behalf of such person, and the plea so entered shall have the same effect as if such person had actually pleaded the same. And where the prisoner, who was indicted for murder, remained mute of malice, Erle, J., refused to assign counsel for his defence, as the prisoner's assent could not under the circumstances be given. *Yscuado's case,* 6 *Cox, C. C.* 386.

Where the prisoner refused to plead on the ground that he had already pleaded to an indictment for the same offence, (which had been tried before a court not having jurisdiction,) it was held that the court might order a plea of "not guilty," to be entered for him under the above statute. *Bitton's case,* 6 *C. & P.* 92.

In cases of insanity, it is enacted by the 39 & 40 Geo. 3, c. 94, s. 1, that if upon the trial of any person for treason, murder, or felony, (or misdemeanor, 3 & 4 Vict. c. 54, s. 3) insanity at the time of committing the offence is given in evidence, and the jury acquit, they must be required to find specially whether such person was insane at the time of the commission of the offence, and whether he was acquitted on that account: and if they find in the affirmative, the court must order him to be kept in custody till his majesty's pleasure be known. And by the 39 & 40 Geo. 4, c. 94, s. 2, if a person indicted for any offence appears insane, the court may, on his arraignment, order a jury to be impanelled to try the sanity, and if they find him insane, may order the finding to be recorded, and the insane person to be kept in custody till his majesty's pleasure be known.

The latter section applies to misdemeanors as well as to felonies. *Little's case, Russ. & Ry.* 430.

When a jury is impanelled to try the sanity of a prisoner under this section, the counsel for the prosecution begins and calls his witnesses to prove the sanity of the prisoner. *Per Williams, J., Davis's case,* 3 *C. & K.* 328.

Similar provisions in the case of insane persons being indicted are made with regard to Ireland, by the 1 & 2 Geo. 4, c. 33, ss. 16, 17.

Where a party was indicted for a misdemeanor in uttering seditious words, and upon his arraignment refused to plead, and showed symptoms of insanity, and an inquest was forthwith taken under the above statute to try whether he was insane or not, it was held, 1st, that the jury might form their own judgment of the present state of the defendant's mind from his demeanor while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state; 2ndly, that upon the prisoner showing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses on the inquest, or would offer any remarks on evidence. *Goode's case,* 7 *A. & E.* 536.

A grand jury ought not to ignore a bill on the ground of insanity,

but if they believe that the acts done, if committed by a sane person, would have amounted to the offence charged, it is their duty to find the bill, otherwise the court cannot order the party to be detained in custody under the foregoing act. *Hodges's case*, 8 *C. & P.* 195.

Postponing the trial.] No traverse is allowed in case of felony, but where the courts deem it necessary for the purposes of justice, they will postpone the trial until the next assizes or sessions. And now misdemeanors are put on the same footing in this respect as felonies; the 14 & 15 Vict. c. 100, s. 27, enacting that "no person prosecuted shall be entitled to traverse or postpone the trial of *any* indictment found against him at any session of the peace, session of oyer and terminer, and general gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise shall be of opinion that he ought to be allowed a further term, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose."

Instances have occurred in which a principal witness has been of such tender years and so ignorant as not to understand the nature and obligation of an oath, that the judge has ordered the trial to be put off until the next assizes, and directed the child in the meantime to be instructed in religion. *Ante*, p. 121. Also where it appears by affidavit that a necessary witness for the prisoner is ill, *Hunter's case*, 3 *C. & P.* 591, or that a witness for the prosecution is ill (see *post*,) or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial.

If it is moved on the part of the prosecution in a case of felony, to put off the trial on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. *Savage's case*, 1 *C. & K.* 75. An affidavit of a surgeon, that the witness is the mother of an unweaned child afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground on which to found a motion to postpone the trial. *Ib.* Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without showing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would appear. *Macarthy's case*, *Carr. & M.* 625. In *Palmer's case*, 6 *C. & P.* 652, the judges of the central criminal court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to

material facts. Where, in a case of murder committed in Newcastle-upon-Tyne, which had created great excitement, a newspaper published in the town had spoken of the prisoner as the murderer, and several journals down to the time of the assizes had published paragraphs, implying or tending to show his guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county of Northumberland (into which the indictment had been removed), Alderson and Parke, Bs., postponed the trial until the following assizes. Alderson, B., however, said, "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." *Bolam's case*, *Newcastle Spring Ass.* 1839, *MS.*; 2 *Moo. & R.* 192. See also *Joliffe's case*, 4 *T. R.* 285. And in *Johnson's case*, 2 *C. & K.* 354, the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be thereby afforded of investigating the evidence and characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased.

In no instance will a trial be put off on account of the absence of witnesses to character. *Jones's case*, 8 *East*, 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor. *Hunter's case*, 3 *C. & P.* 591. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances. *Beardmore's case*, 7 *C. & P.* 407; *Parish's case*, *id.* 782; *Osborne's case*, *id.* 799; see also *Crowe's case*, 4 *C. & P.* 251. A motion to put off a trial on an indictment for felony made on behalf of the prisoner, cannot be entertained until after plea pleaded. *Bolam's case*, 2 *Moo. & R.* 192. Where an application was made by the prisoner to postpone the trial after the jury had been charged with the indictment, and before any evidence had been given in the case, Cresswell, J., doubted whether this could be legally done, but after consulting Mr. J. Foster's work on the crown law, (see *Wedderburne's case*, *Fost. Cr. L.* 22,) his lordship said, the better opinion seemed to be that it might. The affidavit, however, produced by the prisoner was not considered sufficient to support the application. *Fitzgerald's case*, 1 *C. & K.* 201. Previous to the spring assizes A. was committed to take his trial for shooting B. The trial was postponed till the summer assizes, on the ground that B. (who shortly afterwards died) was too ill from his wounds to attend to give evidence. At the summer assizes a true bill was found against A. for the murder of B., and an application was made to put off the trial until the following spring assizes, on account of the illness of a material witness. Williams, J., granted the application, and held that A. was not entitled to his discharge under the seventh section of the habeas corpus act. *Bowen's case*, 9 *C. & P.* 509; see 8 *C. & P.* 558.

Plea.] By the 7 & 8 Geo. 4, c. 28, s. 1, "if any person not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have put himself

upon the country for trial, and the court shall in the usual manner order a jury for trial of such person accordingly." A prisoner cannot plead a special plea in addition to the general issue. *Strahan's case*, 7 *Cox*, *C. C.* 85.

A plea of *autrefois acquit* may be pleaded *ore tenus*. *Bowman's case*, 6 *C. & P.* 337; *Champney's case*, 2 *Moo. & R.* 26; 2 *Lew. C. C.* 52; *Coogan's case*, 1 *Leach*, 448. Where by reason of some defect in the record a prisoner has not been lawfully liable to suffer judgment for the offence charged, he has not been in jeopardy for the same so as to entitle him to plead the former proceeding in bar to a subsequent indictment. *Drury's case*, 18 *L. J. M. C.* 189. See also *Susannah Green's case*, *Weekly Rep.* 1856, *p.* 56. Where the prisoners had been acquitted of murder and were subsequently indicted for an assault, to which they pleaded *autrefois acquit*, it was left to the jury that they should find the prisoners guilty if they were satisfied that there had been an independent assault which did not in any way conduce to the death of the deceased. The jury found the prisoners guilty, and the conviction was upheld by a majority of the judges. *Bird's case*, 2 *Den. C. C.* 94, *S. C.* 20 *L. J. M. C.* 70. See also *Henderson's case*, *C. & M.* 328; *Walker's case*, 2 *M. & Rob.* 446; and *Gisson's case*, 2 *C. & K.* 781. If the record of the previous acquittal is not made up, the court will postpone the trial to enable the prisoner to apply for a mandamus to make up the record; *Bowman's case*, *supra*; which mandamus the Q. B. will grant, although it be the record of a sessions improperly held, for the prisoner has a right to have the record of the process correctly made up, to make what use of it he can. *R.* v. *Just. of Middlesex*, 5 *B. & Ad.* 1113. Where a person pleaded a plea of *autrefois convict*, the court would not reject it on the ground of informality, but assigned counsel to put it into a formal shape, and postponed the trial to give time for its preparation. *Chamberlain's case*. 6 *C. & P.* 93.

With respect to the pleas of *autrefois acquit* and *autrefois convict*, it is now provided by the 14 & 15 Vict. c. 100, s. 28, that "in any plea of *autrefois convict* or *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the said offence charged in the indictment." And by the 14 & 15 Vict. c. 99, s. 13, it is enacted "that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction, or acquittal, of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of any such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof."

Joinder of distinct offences in the indictment—putting the prosecutor to his election.] Even before the passing of the 14 & 15 Vict. c. 100, there was no objection in point of law to the insertion in separate counts of the same indictment of distinct felonies of the same degree committed by the same offender; 2 *Hale*, 173; 1 *Leach*, 1103; nor was it a ground for demurrer or arrest of judgment; *Id.*; 1 *Chit. C. L.* 253; 3 *T. R.* 98; *Hinley's case*, 2 *Moo. & R.* 524; *O'Connell* v. *Reg.*

11 *C. & F.* 155; nor is it any ground for arrest of judgment, after a prisoner has been convicted of felony, that the indictment contains a count for a misdemeanour. *Ferguson's case*, 1 *Dear. C. C. R.* 427; *S. C.* 24 *L. J. M. C.* 61. In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded or the jury were charged, the court in its discretion would quash the indictment; or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed. *Young's case*, 3 *T. R.* 106; 2 *East, P. C.* 515; 2 *Campb.* 131; 3 *Campb.* 133; 2 *M. & S.* 539. Now, as respects "cases of larceny, the 14 & 15 Vict. c. 100, s. 16, expressly enacts that it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them." And by s. 16, "if upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings."

As respects embezzlement, by a former statute, the 7 & 8 Geo. 4, c. 29, s. 8, there is provision similar to the 14 & 15 Vict. c. 100, s. 6.

With respect to joining a count for stealing along with a count for receiving in the same indictment, the practice of doing so was condemned by the judges in *Galloway's case*, 1 *Moo. C. C.* 234. But now it is enacted, by the 11 & 12 Vict. c. 46, s. 3, that "in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property knowing it to have been stolen," and *vice versâ*: "and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property or of receiving it knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it knowing it to have been stolen.".

With respect to offences not provided for by the above enactments:—where the prisoners were charged, in one count with robbing, and in a second with an assault with intent to rob, Park, J., seemed to think that the two counts ought not to be joined in the same indictment, and called upon the prosecutor to elect on which he would go to the jury. *Gough's case*, 1 *Moo. & R.* 71. Where however the defendant was indicted under the 7 Wm. 4, and 1 Vict. c. 85, ss. 2, 4, in several counts for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was held

that the prosecutor was not bound to elect on which count he would proceed, notwithstanding the judgment is different, being in the first count capital, and in the other transportation. *Strange's case*, 8 *C. & P.* 172. See also *Jones's case*, 2 *Moo. C. C.* 94; 8 *C. & P.* 776. Where an indictment for arson contained five counts, each of which charged the firing of a house of a different party, and it was opened that the five houses were in a row, and that one fire burnt them all; Erskine, J., refused, upon this opening, to put the prosecutor to his election, as it was all one transaction. *Trueman's case*, 8 *C. & P.* 727.

Counts for distinct misdemeanors may be included in the same indictment, provided the judgment be the same for each offence. *Young's case*, 3 *T. R.* 98, 106; *Towle's case*, 2 *Marsh.* 466; *Johnson's case*, 3 *M. & S.* 539; *Jones's case*, 2 *Campb.* 130. Where, however, two defendants were indicted for a conspiracy and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but no evidence against one as to the libel; Coleridge, J., put the prosecutor to his election, on which charge he would proceed, before the counsel for the defendants entered upon their defence. *Murphy's case*, 8 *C. & P.* 297. A prosecutor cannot maintain two indictments for misdemeanor for the same transaction, and he must elect to proceed with the one and abandon the other. *Britton's case*, 1 *Moo. & R.* 297.

The application for a prisoner to elect is an application to the discretion of the court founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *Trueman's case*, 8 *C. & P.* 727; *Hinley's case*, 2 *Moo. & R.* 524. It is not usual to put the prosecutor to his election immediately upon the case being opened. *Wrigglewbrth's case*, *cor. Alderson*, *J.*, *Hindmarch's Suppl. to Deacon's C. L.* 1583. And *semble*, that the reason for putting a prosecutor to his election, being that the prisoner may not have his attention divided between two charges, the election ought to be made not merely before the case goes to the jury, as it is sometimes laid down, but before the prisoner is called on for his defence at the latest. *Id.*

Quashing indictments.] Where an indictment is so defective that in case of conviction no judgment could be given, the court will in general quash it. Thus an indictment for perjury found at sessions has been quashed because the sessions have no jurisdiction of perjury. *Bainton's case*, 2 *Str.* 1088. See *Hewitt's case*, *R. & R.* 158; *Rigby's case*, 8 *C. & P.* 770. So indictments have been quashed because the facts stated in them did not amount to an offence punishable by law. *Burket's case*, *Andr.* 230; *Sermon's case*, 1 *Burr.* 516, 543; *Philpott's case*, 1 *C. & K.* 112. Where the application is on the part of the defendant, the courts have almost uniformly refused to quash an indictment when it was preferred for some great crime, such as treason or felony; *Com. Dig. Indictment* (H.); and see *Johnson's case*, 1 *Wils.* 325; forgery, perjury, or subornation of perjury; *Belton's case*, 1 *Salk.* 372; 1 *Sid.* 54; 1 *Vent.* 370; *Thomas's case*, 3 *D. & R.* 621. They have also refused to quash indictments for cheating; *Orbell's case*, 1 *Mod.* 42; for selling flour by false weights; *Crooke's case*, 3 *Burr.* 1841; and for other minor offences. If the application is made on behalf of the defendant, the court will not grant it, unless the defect is very clear and obvious, but will leave him to demur. 1 *Chitty, C. L.* 299.

But if the application is on the part of the prosecution, the court will quash the indictment in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *boná fide*, and not instituted from malicious motives or for purposes of oppression. Where the prosecution is by the attorney-general, an application to quash the indictment is never made, because he may enter a *nolle prosequi*, which will have the same effect. *Stratton's case*, 1 *Doug.* 239, 240. See also *Bumby's case*, 5 *Q. B.* 348.

The application to quash must be made to the court in which the bill is found, except in cases of indictments at sessions, and in other inferior courts, in which cases the application is made to the court of Queen's Bench, the record being previously removed there by *certiorari*. But it has been recently held that a court of quarter sessions has itself authority to quash an indictment found there before pleaded; and that the court of Queen's Bench would not inquire on *certiorari* whether the indictment was properly quashed, but that the proper way of raising such a question was by writ of error. *Wilson's case*, 6 *Q. B.* 620.

The application, if made on the part of the defendant, must be before plea pleaded. *Fost.* 231; *Rookwood's case*, *Id.*, 684; 4 *St. Trials.* Where the indictment had, upon the application of the defendant, been removed into the court of King's Bench, by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance, by not having carried the record down to trial. *Anon.* 1 *Salk.* 380. And now by the 14 & 15 Vict. c. 100, s. 25, "every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." It is no ground for an application to quash an indictment that another indictment has been prepared for the same alleged offence. *Stockley's case*, 3 *Q. B.* 238.

But if the application be on the part of the prosecution, it seems it may be made at any time before the defendant has been actually tried upon the indictment. *Webb's case*, 3 *Burr.* 1468. Before an application of this kind on the part of the prosecution is granted, a new bill for the same offence must have been preferred against the defendant, and found. *Wynn's case*, 2 *East*, 226. And when the court orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment; *Webb's case*, 3 *Burr.* 1469; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it had not been quashed; *Glen's case*, 3 *B. & Ald.* 373; *Webb's case*, 3 *Burr.* 1468; 1 *W. Bl.* 460; and (particularly where there has been any vexatious delay on the part of the prosecution, 3 *Burr.* 1458,) that the name of the prosecutor be disclosed. *Glen's case*, *supra*. A. was indicted for perjury at the spring assizes 1843, and entered into recognizances to try at the summer assizes 1844. It being discovered that the indictment was defective, another indictment was prepared and found at the latter assizes, on which the prosecutor wished the defendant to be tried. Wightman, J., held

that the defendant was entitled to have the first indictment disposed of before he could be tried on the second, but quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognizances, and the defendant proceeded to trial on the second indictment without traversing. *Dunn's case*, 1 *C. & K.* 730.

Particulars of the offence.] Where an indictment for a nuisance contained twelve counts, describing the nuisance in different ways, and charging it to have been committed in different parishes and counties within the jurisdiction of the central criminal court; the court of Q.B., on reading the indictment only (which had been removed by *certiorari*) and without affidavit ordered the prosecutor to give the defendant a note of the several acts of nuisance which he intended to prove. *Curwood's case*, 3 *A. & E.* 815.

With respect to particulars of the offence in cases of barratry, conspiracy, and embezzlement, see those titles; also *Highways*.

Opening the case—conversations and confessions.] Where there is counsel for a prisoner in a case of felony, the counsel for the prosecution ought always to open the case. *Gascoine's case*, 7 *C. & P.* 772. But he need not open it if the prisoner has no counsel, *Jackson's case*, *Id.* 773, unless there is some peculiarity in the circumstances. *Per Parke, B.*, *Bowler's case*, *Id.* Where there is no counsel for the prosecution there can be no opening, as the prosecutor himself is never allowed personally to address the jury. *Brice's case*, 2 *B. & Ald.* 606. Where the counsel for the prosecution was proceeding to state the details of a conversation which one of the witnesses had had with the prisoner, upon an objection being taken, the court said that in strictness he had a right to pursue that course; *Deering's case*, 5 *C. & P.* 165; 7 *C. & P.* 773; and the same rule was laid down in *Swatkin's case*, 4 *C. & P.* 548; but the judges in that case stated, that the correct practice was only to state the general effect of the conversation. 5 *C. & P.* 166 (*n*). In a later case, however, Parke, B., after consulting Alderson, B., ruled that with regard to conversations, the fair course to the prisoner was to state what it was intended to prove. *Orrell's case*, *MS. Lanc. Spr. Ass.* 1835; 1 *Moo. & R.* 467; *Hartel's case*, 7 *C. & P.* 773; *Davis's case*, *Id.* 785. The rule is different with respect to confessions, which, it has frequently been held, ought not to be opened, as they may turn out to have been made under circumstances rendering them inadmissible in evidence. *Per Bosanquet and Patteson, JJ.*, *Swatkin's case*, 4 *C. & P.* 548; *Hartel's case*, *supra* (*n*). *Per Parke, B.*, *Davis's case*, *supra*.

Prisoners' counsel act.] Formerly prisoners charged with felony were not allowed to make their defence by counsel, but now the 6 & 7 Wm. 4, c. 114, (U. K.,) after reciting that "it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts that "all persons tried for felony shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney in courts, where attorneys practise as counsel."

And by s. 2, "in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney."

Where the counsel for several prisoners cannot agree as to the order in which they are to address the jury, the court will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment. But where the counsel for one prisoner has witnesses to facts to examine, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined. *Barber's case*, 1 *C. & K.* 434.

A prisoner's counsel, in addressing the jury, will not be allowed to state any thing which he is not in a situation to prove, or which is not already in proof; neither will he be allowed to relate the prisoner's story; "for, if he employs counsel, he must submit to the rules which have been established with respect to the conducting of cases by counsel." *Per Coleridge, J., Beard's case*, 8 *C. & P.* 142. And after his counsel has addressed the jury, the prisoner will not be permitted to make any statement to them. *Boucher's case, Id.* 141. But where a prisoner had in the absence of his counsel pleaded to an indictment, Patteson, J., on the application of the counsel, allowed the prisoner to demur before the evidence was gone into. *Purchase's case*, *C. & M.* 617. Where, in a case of shooting with intent to do grievous bodily harm, there was no one present at the committing of the offence but the prosecutor and the prisoner, Alderson, B., allowed the latter, under these peculiar circumstances, to make his own statement before his counsel addressed the jury. *Malings' case*, 8 *C. & P.* 242. And the same course was permitted by Gurney, B., in another case, but with an observation that it ought not to be drawn into a precedent. *Walkling's case, Id.* 243. "The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed." *Per Patteson, J., Rider's case*, 8 *C. & P.* 539. See also *Reg.* v. *Dyer*, 1 *Cox, C. C.* 113. Where several defendants charged in an indictment with different illegal acts severed in their defence, and having been convicted and sentenced to different punishments, brought separate acts of error, they were held to be entitled to appear by separate counsel, and that such counsel were severally entitled to reply. *O'Connell's case*, 11 *Cl. & F.* 155.

Rules of practice on the prisoners' counsel act—cross-examination of witnesses on their depositions—prosecutor's right to reply.] The third and fourth clauses of the foregoing act, entitling prisoners to copies of the depositions, or to inspect them at the trial, have already been given, *ante*, p. 73.

At a meeting of twelve of the judges for the purpose of choosing the spring circuits of 1837, (Littledale, J., Bosanquet, J., and Coleridge, J., being absent through indisposition) the following rules of practice, with reference to the above statute, were laid down.

1. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such a statement until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness

in court and his former deposition; after which the counsel for the prosecution may re-examine, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variances or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot in cross-examination be compelled to answer whether he did or did not make such or such a statement before the magistrate until after his deposition has been read, and it appears that it contains no mention of such a statement. In that event the counsel for the prisoner may proceed with his cross-examination; and if the witness admits such statements to have been made, he may comment upon such omission or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not: cases may occur in which it may be fit and proper so to do.

In cases of public prosecutions for felony, instituted by the crown, the law officers of the crown, and those who represent them, are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner.

The foregoing resolutions of the judges as to cross-examining from the depositions are binding upon the prisoners' counsel; but, it seems that the judge may, if he think fit, notwithstanding those resolutions, himself question a witness as to any discrepancy between his deposition and his evidence at the trial. *Edward's case*, 8 *C. & P.* 26.

In cross-examining a witness for the prosecution, it is not allowable for the counsel for the prisoner to put the witness's deposition into his hand, in order that he may read it; and then to ask him whether, having read it, he still perseveres in the statement which he has made on the trial. The proper course is to read the deposition to him at the time, and then to cross-examine upon it. *Ford's case*, 2 *Den. C. C. R.* 245, *S. C.* 20 *L. J. M. C.* 171. But after the witnesses have been examined before the magistrate, any statement subsequently made by a witness, even though it appear upon the depositions, may be cross-examined upon without putting in the depositions. Thus, where the depositions had been taken, but the magistrate's clerk, in drawing them up, put certain questions to the witnesses, and inserted the answers in the depositions, and the depositions were subsequently read over to the prisoner in the presence of the magistrate, and full opportunity was given to the prisoner to cross-examine the witnesses before they signed their depositions; it was held, that a witness could be asked by the prisoner's counsel as to statements made to the magistrate's clerk without putting in the depositions. *Smith's case*, 19 *L. J. M. C.* 103, *S. C.* 1 *Den. C. C. R.* 536.

Where a witness admitted that, when before the magistrate he was cross-examined by the prisoner's solicitor, the prisoner's counsel

was allowed to question him as to the answers he gave, on its appearing to the judge that no cross-examination was returned by the magistrate. *Edward's case, ante*, p. 225. But in a more recent case, Erskine, J., said, he was clearly of opinion, that in order to prove that a witness did not state a particular fact before the magistrate, the deposition itself must be put in to show what he did state, and that a witness cannot be questioned as to what he did or did not state before the magistrate, without first allowing him to read, or having read over to him his deposition. *Taylor's case*, 8 *C. & P.* 726. Erle, J., on the cross-examination of a witness for the prosecution, allowed him to be asked whether he did not make a certain statement whilst under cross-examination before the magistrates, although the depositions contained no note of such cross-examination. *Curtis's case*, 2 *C. & K.* 763. Where it appeared that after the minutes of evidence had been taken, and whilst the depositions were being written out from the minutes by the clerk, questions were put, not in the presence of the magistrates, by the clerk so employed, to the prisoner for the purpose of rendering the depositions more complete, it was held that the prisoner might ask as to those questions without putting in the depositions, although it appeared that the answers to the questions were inserted in the depositions, and had been afterwards in the presence of the prisoner, and before the magistrates, read over to the prisoner and had been signed by him. *Christopher's case*, 1 *Den. C. C. R.* 536, *S. C.* 19 *L. J. M. C.* 103.

The usual practice, on asking a witness for the prosecution whether he has not made a certain statement, has been to require the counsel for the prisoner to except from the question any statement made by the witness when before the committing magistrates; but in *Harris's case, Liv. Sum. Ass.* 1845, *MS.*, Rolfe, Baron, held it to be unnecessary to make such an exception, as it only tended to confuse the witness, and no use could be made of any variance between what was stated by the witness at the trial and what he had sworn to in his deposition, without putting the latter into his hands.

Where four prisoners were jointly indicted, two for stealing a sheep, and two for receiving separate parts of the sheep so stolen, and the counsel for the receivers put in the depositions to contradict the case against them, by showing a variation between the testimony of the principal witness and his deposition, but no evidence was given on behalf of the other prisoners; Parke, B., after conferring with Coltman, J., stated that the reply must be confined altogether to the case of the receivers. His lordship added, that he did not wish to lay down a general rule, that in no case where several were indicted together, would witnesses called by one, entitle the prosecutor to reply against all, but in the case before him the offences were distinct, as the receivers might have been indicted separately from the principals. *Hayes' case*, 2 *Moo. & R.* 155. Three prisoners were indicted for murder, and witnesses were called for the defence of one only; Talfourd, J., held that the counsel for the prosecution was entitled to reply generally on the case, and was not to be limited in his reply to the case as against the prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not affect the case as it respected the other two prisoners. *Blackburn's case*, 3 *C. & K.* 330.

A. and B., the drivers of rival omnibuses, were indicted for the manslaughter of C., caused by their negligence in driving. After

the case for the prosecution had closed, and A.'s counsel had addressed the jury, witnesses were called on behalf of B., for the purpose of throwing all the blame on A.; held that the counsel for A. was entitled to cross-examine B.'s witnesses, and again to address the jury. *Wood's case*, 6 *Cox, C. C.* 224. Acc. *Burdett's case*, 24 *L. J. M. C.* 63.

Where there were cross indictments for assault to be tried as traverses at the assizes, and the same transaction was the subject-matter of both indictments, Gurney, B., directed the jury to be sworn on both traverses, and the counsel for the prosecution of the indictment first entered to open his case and call his witnesses, and then the counsel on the other side to open his case and call his witnesses, neither side to have a reply. *Wanklyn's case*, 8 *C. & P.* 290.

The counsel for the crown, where the crown is the defendant in a writ of error, is not necessarily entitled to the reply, though the crown is the real litigant party. *O'Connell* v. *Reg.* 11 *C. & F.* 155. Where it was stated by the counsel for the prosecution by the post-office for a felony, that he appeared as the representative of the attorney-general, it was held he was entitled to reply, although the prisoner had not called witnesses. *Ann Gardner's case*, 1 *C. & K.* 628.

Discharge of jury.] If a juryman be taken ill so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*, or another juryman may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo*. *Edward's case*, *Russ. & Ry.* 224; 4 *Taunt.* 309; 2 *Leach*, 621, (*n.*); *Reg.* v. *Ashe*, 1 *Cox, C. C.* 150. So if during the trial the prisoner be taken so ill that he is incapable of remaining at the bar, the judge may discharge the jury, and, on the prisoner's recovery, another jury may be returned; and the proceedings commenced *de novo*. The court, on a trial for a misdemeanor, doubted whether in such a case the consent of counsel was sufficient to justify the proceeding with the trial in the absence of the defendant. *Streek's case*, *coram Park, J.*, 2 *C. & P.* 413.

When the evidence on both sides is closed, or after any evidence has been given, the jury cannot be discharged unless in case of evident necessity, (as in the cases above mentioned), till they have given in their verdict, but are to consider of it and deliver it in open court. But the judges may adjourn while the jury are withdrawn to confer, and may return to receive the verdict in open court. 4 *Bl. Com.* 360. And when a criminal trial runs to such length that it cannot be concluded in one day, the court, by its own authority, may adjourn till next morning. But the jury must be kept together, (at least in a capital case,) that they may have no communication but with each other. 6 *T. R.* 527; *Stephen's Summary*, 313. It is a general rule that upon a criminal trial there can be no separation of the jury after the evidence is entered upon, and before a verdict is given. *Langhorn's case*, 7 *How. St. Tr.* 497; *Hardy's case*, 24 *Id.* 414. In the latter case, on the first night of the trial, beds were provided for the jury, at the Old Bailey, and the court adjourned till the next morning. On the second night, with the consent of the counsel on both sides, the court permitted the jury to pass the night at a tavern, whither they were conducted by the

under-sheriffs and four officers sworn to keep the jury. *Id.* 572. See a decision on a writ of error of the court of Queen's Bench in Ireland, as to a judge, in a capital case, in the absence of any fatality or evident necessity, having no discretionary power to discharge a jury who cannot agree on the verdict. *Conway & Lynch* v. *Reg.* 1 *Cox, C. C.* 210.

It is not a sufficient ground for discharging a jury, that a material witness for the crown is not acquainted with the nature of an oath, though this is discovered before any evidence is given. *Wade's case,* 1 *Moody, C. C.* 86, *ante*, p. 125. So where during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C. J., held that he had no power to discharge the jury, but that the trial must proceed. *Wardle's case, Carr. & M.* 647. If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 *Hale, P. C.* 34; 18 *St. Tr.* 411; *Russ. & Ry.* 431 (*n*). On a trial for manslaughter, it was discovered, after the swearing of the jury, that the surgeon who had examined the body was absent, and the prisoner prayed that the jury might be discharged; they were discharged accordingly, and the prisoner was tried the next day. *Stoke's case*, 6 *C. & P.* 151. In a case of larceny, after all the witnesses had been examined, the stolen property not being immediately forthcoming, a messenger was sent for it, and in the interim the learned judge, Gurney, B., proceeded with the trial of another case before the same jury. *Wenborn's case,* 6 *Jur.* 267.

Former conviction.] The 7 & 8 Geo. 4, c. 28, s. 11, (in Ireland the 9 Geo. 4, c. 54, s. 20,) for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, enacts "that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction of felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony: and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eight pence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

Now by the 14 & 15 Vict. c. 19, s. 9, it is enacted "that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until

they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: provided that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

It has been held by Cresswell, J., that a certificate of a previous conviction under the 7 & 8 Geo. 4, c. 28, s. 11, must state that judgment was given. *Ackroyd's case*, 1 *C. & K.* 158. This, however, does not seem to be required by the statute, and other judges have been in the habit of receiving certificates of a previous conviction without any reference to the judgment. See *Burgess* v. *Boetefeur*, 7 *M. & G.* 491, 498.

Although the jury are no longer charged to inquire concerning such previous conviction until after the prisoner is convicted of the subsequent felony, the latter is still required to plead to the whole indictment, and as this generally takes place in the hearing of the jury, and immediately before the trial, the intention of the last-mentioned act to secure a fair and impartial inquiry as regards the subsequent felony, is liable to be defeated.

It is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate—(*e. g.*) by the gaoler, who received him into his custody under such sentence, without producing any witness who was present at the former trial. *Crofts' case*, 9 *C. & P.* 219.

The record of conviction, however, must be proved; neither the production of the calendar of the witnesses signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient. *Per Maule, J., in Bourdon's case*, 2 *C. & K.* 366.

In *Shuttleworth's case*, 2 *Den. C. C. R.* 351, *S. C.* 21 *L. J. M. C.* 36, Lord Campbell, C. J., said, "The statute 14 & 15 Vict. c. 19, s. 9, shows in what order the proceedings should take place. There is no doubt but that the prisoner is to be arraigned upon the whole indictment, but to the jury is only to be read in the first instance that part which charges the new offence. After the jury have found their verdict, then that part of the indictment is to be submitted to them (without their being again sworn) which charges the previous conviction. That this is the proper course has been determined, on full consideration, by the whole body of judges."

Any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner. *Clark's case*, 1 *Dears. C. C. R.* 198, *S. C.* 22 *L. J. M. C.* 135.

If a prisoner's counsel elicit, on cross-examination, from the witnesses for the prosecution, that the prisoner has borne a good character, a previous conviction may be put in evidence against him, in like manner as if witnesses to his character had been called. *Per Parke, B., Gadbury's case*, 8 *C. & P.* 676. It is "giving evidence" within the proviso in the 14 & 15 Vict. c. 19, s. 9. *Shrimpton's case*, 2 *Den. C. C. R.* 319, *S. C.* 21 *L. J. M. C.* 37.

Trial.] As a general rule, indictments for felonies and misdemeanors are tried within the jurisdiction in which the offence is committed, or in which by statute the venue must be laid (see *post*, *Venue*), and before the court in which the indictment is preferred. But the judges of assize have authority, and ought to try indictments found at the quarter sessions, and transmitted to them for trial by the justices, although not removed by *certiorari*. *Wetherill's case*, *Russ. & Ry.* 381; 1 *Lewin*, *C. C.* 208. And the court of Q. B. has jurisdiction to change the place of trial in felonies and misdemeanors, whenever it is necessary, for the purpose of securing as far as possible a fair and impartial trial. *Per Lord Denman*, *C. J.*, 5 *B. & Ad.* 354. For this purpose a *certiorari* must issue to remove the indictment into the court of Q. B., upon which at common law, after the general issue pleaded, there would be a trial at bar by a jury of the county in which the indictment was preferred. But a writ of nisi prius usually issues by the attorney-general's consent, 2 *Inst.* 421, to the proper county in which the indictment was found, unless the *venire* be awarded to a foreign county upon suggestion by order of the court.

The writ of *certiorari* is demandable as of right by the crown, *R.* v. *Eaton*, 2 *T. R.* 89, and issues, as of course, where the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown; *Ib. R.* v. *Lewis*, 4 *Burr.* 2458; and this even though the *certiorari* is expressly taken away by statute; for unless named the crown is not bound by statute. By analogy to this rule the *certiorari* was formerly granted almost of course to private prosecutors, who were said to represent the crown, at whose suit all indictments are instituted. But now, by the 5 & 6 Wm. 4, c. 33, no writ of *certiorari* can issue from the court of Q. B. at the instance of any prosecutor or other person (except the attorney-general) without motion first made in court, or to a judge at chambers, and leave obtained, in the same manner as if the application were made by the defendant. It is now therefore in the discretion of the court to grant or refuse the *certiorari* at the prayer of either party, 2 *Hawk. c.* 27, *s.* 27; and in the exercise of this discretion the writ is seldom granted at the prayer of the defendant, where the offence is a grave one, as in perjury, forgery, or any serious misdemeanor, *Id. s.* 28, *R.* v. *Pusey*, 3 *Str.* 717; murder, *R.* v. *Mead*, 3 *D. & R.* 301, *R.* v. *Thomas*, 4 *M. & Sel.* 442; unnatural crimes, *R.* v. *Holden*, 5 *B. & Ad.* 447; and the like. So the court will not in general, except by the consent of the prosecutor, remove an indictment from a court of competent jurisdiction, where any of the judges preside; see *R.* v. *Wartnaby*, 2 *Ad. & Ell.* 435; *R.* v. *Duchess of Kingston*, *Cowp.* 283; and the mere necessity for a special jury is not alone a sufficient ground for granting the writ. *R.* v. *Green*, 1 *Wil. Wol. & Hod.* 35. The court will however remove an indictment where it is clear that difficult points of law may arise. *R.* v. *Wartnaby*, 2 *Ad. & E.* 435; *R.* v. *Green*, 1 *Wil. Wol. & Hod.* 35. And if it be clearly made out that there is a fair and reasonable probability of partiality and prejudice in the jurisdiction within which the indictment would otherwise be tried, the *certiorari* will be granted. *R.* v. *Lewis*, 2 *Str.* 704; *R.* v. *Fowle*, 2 *Ld. Raym.* 1452; *R.* v. *Waddington*, 1 *East*, 167; *R.* v. *Penpraze*, 4 *B. & Ad.* 575; 1 *Nev. & M.* 312; *R.* v. *Hunt*, 3 *B. & Ald.* 444; *R.* v. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167; *R.* v. *Lever*, 1 *Wil. Wol. & Hod.* 35. So if the prosecutor or his attorney be sheriff or under-

sheriff, *R.* v. *Webb*, 2 *Str.* 1068; *R.* v. *Knatchbull*, 1 *Salk.* 150—the writ will be granted. It is said also, that if the prosecution originate in malice, *Bac. Abr. Certiorari* (A.), or if there has been vexatious delay, *R.* v. *Morgan*, 2 *Str.* 1049, *R.* v. *Ferguson*, *Rep. Temp. Hard.* 370, or unnecessary expense, the court will grant a *certiorari*. *Com. Dig. Certiorari* (D.).

By the 60 Geo. 3, and 1 Wm. 4, c. 4, s. 4, the *certiorari* may be applied for before the indictment is found for a misdemeanor; and so likewise in felony; for it removes any record that shall come within its description before its return. 2 *Hawk. c.* 27, *s.* 23. Where there are several defendants, all should concur either on their own behalf or on behalf of the applicant. *R.* v. *Hunt*, 2 *Chit. Rep.* 130.

If the defendant remove an indictment by *certiorari*, he will, if convicted, be liable to costs to the prosecutor or party grieved, 5 & 6 W. & M. c. 11, s. 3, on the counts on which he is convicted. *Reg.* v. *Hawdon*, 11 *Ad. & E.* 143; 3 *P. & D.* 44. See further 1 *Burn's Just. by Chitty*, 624; *Archb. C. L.* 68, 10*th ed.*

Where A. and B. pleaded not guilty to an indictment for conspiracy, and B. died between the *venire* and distringas, and A. was tried alone and found guilty, it was held not to be a mistrial. *Reg.* v. *Kenrick*, 5 *Q. B.* 49.

The judges' commission of gaol delivery applies only to untried prisoners in the gaol, and not to untried prisoners in houses of correction. *Arlett's case*, 2 *C. & K.* 596.

A bill of exceptions cannot be tendered by a prosecutor or a defendant in a criminal case, whether it be for a felony or a misdemeanor; for the statute of Westminster, 13 Edward 1, c. 3, is confined to civil causes. *Alleyne's case*, 1 *Dears. C. C. R.* 505, 509, *S. C.*

Jurisdiction of courts of sessions of the peace.] The jurisdiction of courts of general and quarter sessions has been greatly limited by the 5 & 6 Vict. c. 31, which enacts, that after the passing of that act, neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall at any session of the peace, or at any adjournment thereof, try any person or persons, for any treason, murder, or capital felony, or for any felony which when committed by a person not previously convicted of felony is punishable by transportation beyond the seas for life or for any of the following offences:—1, misprision of treason; 2, offences against the Queen's title, prerogative, person, or government, or against either house of parliament; 3, offences subject to the penalties of præmunire; 4, blasphemy and offences against religion; 5, administering and taking unlawful oaths; 6, perjury and subornation of perjury; 7, making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor; 8, forgery; 9, unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern; 10, bigamy and offences against the laws relating to marriage; 11, abduction of women and girls; 12, endeavouring to conceal the birth of a child; 13, offences against any provision of the laws relating to bankrupts and insolvents; 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15, bribery; 16, unlawful combinations and conspiracies, except conspiracies or combinations to commit

any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17, stealing or fraudulently taking, or injuring, or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein; 18, stealing or fraudulently destroying or concealing wills or testamentary papers or any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements, or hereditaments.

Where the quarter sessions of a county occurred while the judge of assize was proceeding with the trial of prisoners in that county after the grand jury of assizes had been discharged, Coleridge, J., thought that the better course was for the quarter sessions not to proceed with the trial of any prisoners, but to dispose of all their other business and then to adjourn to a future day. *9 C. & P.* 790. While the recorder of Newcastle-upon-Tyne was trying prisoners at an adjourned session, held on the commission day of the assizes, Coltman, J., entered the court, and proceeded to try, as well the remaining prisoners intended to be tried at such sessions, as also those which had been committed for the assizes. *Newc. Spr. Ass.* 1845, *MS.*

In *Smith* v. *Reg.* (*in error*), 18 *L. J. M. C.* 207, it was, however, held that the jurisdiction of a recorder of a borough was not determined or suspended by the arrival of the judges of assize in the same county, and that this would equally apply to the jurisdiction of the quarter sessions for the county.

Verdict.] If by mistake the jury deliver a wrong verdict, (as where it is delivered without the concurrence of all,) and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected. *Parkins's case*, 1 *Moody, C. C.* 46. In *Bodden's case*, 1 *Dear. C. C. R.* 229, *S. C.* 23 *L. J. M. C.* 7, one of the jury pronounced a verdict of "Not Guilty," which was entered by the clerk of the peace in his minute book, and the prisoner was discharged; other jurymen then interfered, and said their verdict was "guilty;" whereupon the prisoner was brought back, and the jury being again asked for their verdict, they all said it was "guilty," and that they had been unanimous; a verdict of guilty having been recorded, it was held by the court of criminal appeal that the verdict was properly amended, and that the conviction must stand.

The jury have a right to find either a general or a special verdict. 4 *Bl. Com.* 361; 1 *Chitty, C. L.* 637, 642; *Mayor, &c., of Devizes* v. *Clark*, 3 *A. & E.* 506. And in a case of felony, although a judge may make the suggestion, he will not direct the jury to find special facts, and they may, if they think proper, return a general verdict, instead of finding special facts, with a view to raise a question of law. *Per Lord Abinger, C. B., Allday's case*, 8 *C. & P.* 136. Upon an indictment for stealing a watch, the jury returned the following verdict:—"We find the prisoner not guilty of stealing the watch, but guilty of keeping it, in the hope of reward, from the time he first had the watch." Held by the court of criminal appeal that this finding amounted to a verdict of "not guilty." *York's case*, 1 *Den. C. C. R.* 335, *S. C.* 18 *L. J. M. C.* 38.

Judgment.] The 11 Geo. 4, and 1 Wm. 4, c. 70, s. 9, (the 1 & 2 Wm. 4, c. 31, s. 4, Irish,) enacts, "that upon all trials for felonies

or misdemeanors, upon any record in the court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the court of King's Bench, or such cases of informations filed by his majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of nisi prius, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had, or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison."

It is not necessary in recording sentence to refer to the statute which gives the punishment. *Murray* v. *Reg.* (*in error*), 7 *Q. B.* 700, *S. C.* 14 *L. J. Q. B.* 357.

Where judgment on a record of the Q. B. is pronounced at the assizes, under the above section, the court on motion under that clause, may, if they think fit, amend the judgment by ordering it to be arrested. *Reg.* v. *Nott*, 4 *Q. B.* 768. A sentence of imprisonment passed at nisi prius, under the above section, the defendant not being present, may declare that the imprisonment shall commence on the day on which he shall be taken to and confined in prison. *King* v. *Reg.* 7 *Q. B.* 782, *S. C.* 14 *L. J. M. C.* 172.

A general judgment for the crown on an indictment containing several counts, one of which is bad, and where the punishment is not fixed by law, cannot be supported. A good finding on a bad count, and a bad finding on a good count, stand on the same footing, both being nullities. And where a count in an indictment contains only one charge against several defendants, the jury cannot find any one of the defendants guilty of more than one charge. *O'Connell* v. *Reg.* 11 *C. & F.* 155. See also the same case as to the insufficiency of a general judgment against a defendant for "his offences aforesaid," on an indictment in which some of the counts are bad, and where on some of the good counts there are bad findings.

In *Campbell* v. *Reg.* (*in error*), 11 *Q. B.* 799, *S. C.* 14 *L. J. M. C.* 76, there were two counts in the indictment, one charging a stealing in the dwelling-house of D., above the value of 5*l.*; the other for a simple larceny of monies of D. (not other monies.) The record stated the verdict to be guilty of "the felony aforesaid," and the sentence ten years' transportation. It was held that the verdict was bad for uncertainty in not specifying the offence of which it found the prisoner guilty, for that the word "felony" was not *nomen collectivum*, but pointed to one particular charge of felony; and that the judgment was erroneous, the court not being at liberty to apply it to the first count only. Where the judgment, entered on the record, was that for the offences charged in each and every count of the indict-

ment, the defendant be imprisoned in the Queen's prison for six months now next ensuing, the Court of Exchequer chamber appeared to think that this was in form a sentence of one term of six months' imprisonment upon the whole indictment, and would, therefore, be erroneous if any count was bad. *Gregory* v. *Reg.* (*in error*), 15 *Q.B.* 957, *S. C.* 19 *L. J. Q. B.* 367. Where upon an indictment containing several counts, the quarter sessions gave a general judgment of transportation for fourteen years, and a writ of error was brought, on the ground that some of the counts were bad; it was held that the fourteen years must be taken to be the same fourteen years upon each count, and that under the 11 & 12 Vict. c. 78, s. 5, the Court of Error, if there were one good count in the indictment, would be bound either to pronounce the judgment, which ought to have been pronounced in the court below, or to remit the record to the sessions, in order that that court should pronounce the proper judgment. *Holloway* v. *Reg.* 2 *Den. C. C. R.* 287, *S. C.* 17 *Q. B.* 319. The 11 & 12 Vict. c. 78, s. 5, above referred to, enacts that, "whenever any writ of error shall be brought upon any judgment on any indictment, &c., in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment," &c.

An offender, upon whom sentence of death has been passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. *Anon. Russ. & Ry.* 268.

Where the defendant had been convicted of a misdemeanor in the Queen's Bench, the prosecutor upon the motion for judgment may produce affidavits to be read in aggravation of the offence, and the defendant may also produce affidavits to be read in mitigation. Affidavits in aggravation are not allowed in felonies, although the record has been removed into the court of Queen's Bench by *certiorari*. *R.* v. *Ellis*, 6 *B. & C.* 145; 3 *Burn's Justice*, *last ed.* 933. Where a prisoner pleaded guilty at the central criminal court to a misdemeanor, and affidavits were filed, both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits. *Reg.* v. *B. Gregory*, 1 *C. & K.* 228. See also the same case as to removing from the files of the court affidavits in mitigation containing scandalous and irrelevant matter, such being a contempt of court; and also as to allowing the opposite party to deny by counter-affidavits, matter relevant and scandalous in the affidavits in mitigation which cannot be removed from the files.

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the crown is to be heard before the counsel for the defendant, and the affidavits in aggravation are to be read before the affidavits in mitigation. *Dignam's case*, 7 *A. & E.* 593. *Contra*, where a verdict of guilty has been taken though by consent, and without evidence. *Caistor's case*, *ib.* 594 (*n*). *Semble*, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, the court heard the counsel for the defendants first. *Sutton's case*, *ib.*

As to what is a sufficient entry upon the record of a new trial in a criminal case, see *King* v. *Reg.* (*in error*), 18 *L. J. Q. B.* 253.

By the 8 & 9 Vict. c. 68, (E. & I.) execution on judgments for misdemeanors may be stayed, or suspended by writ of error and bail thereon. But by the 16 & 17 Vict. c. 32, no execution is to be stayed, or the defendant to be discharged from custody till a recognizance has been given for the defendant's personal appearance, except when the writ is brought by the attorney-general. See sect. 1, and the following sections of that statute. See also *Reg. Gen. Q. B. E. T.* 16 *April*, 1853, 1 *El. & Bl.* 693; *Dugdale* v. *Reg.* (*in error*), 2 *El. & Bl.* 129, *S. C.* 22 *L. J. M. C.* 50; and *Sill* v. *Reg.* (*in error*), 22 *L. J. M. C.* 41.

Recording judgment of death.] By the 4 Geo. 4, c. 48, (E. & I.) s. 1, "whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted, shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit to do so, to direct the proper officer then being present in court, to require and ask, whereupon such officer shall require and ask if such offender hath or knoweth any thing to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall, and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment, to order the same to be entered on record, and thereupon such proper officer as aforesaid shall, and may, and is hereby authorized to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted."

By the 6 & 7 Wm. 4, c. 30, (E. & I.) sentence of death may be pronounced after convictions for murder in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences.

By the act for the better ordering of prisons, (2 & 3 Vict. c. 56, s. 17,) offenders against whom sentence of death is recorded, may be kept to hard labour while they remain in the gaol or house of correction.

New trial.] Where the defendant has been convicted on an indictment for felony, there can be no motion for a new trial. *Edulgee Byramjee* (*ex parte*), 11 *Jur.* 855. After a conviction for a misdemeanor a new trial may be granted at the instance of the defendant where the justice of the case requires it; *Mawbey's case*, 6 *T. R.* 638; though inferior jurisdictions cannot grant a new trial upon the merits but only for an irregularity. (See the cases collected on this point in note (b) to *R.* v. *Inhab. of Oxford*, 13 *East*, 416.) A new trial will be granted on the ground of surprise. *Whitehouse's case*, 1 *Dears. C. C. R.* 1. It must be moved within the first four days of term. *Newman's case*, 1 *El. & Bl.* 268; 22 *L. J. Q. B.* 156. In *R.* v. *Scaife*, 17 *Q. B.* 238, which was a case of felony removed by *certiorari*, a new trial was granted on the ground of the improper reception of

depositions in evidence. Where several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. *Mawbey's case*, 6 *T. R.* 619; *Gompertz's case*, 9 *Q. B.* 824, *S. C.* 16 *L. J. Q. B.* 121. Formerly it was a rule that all the defendants convicted upon an indictment for a misdemeanor must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. *Teal's case*, 11 *East*, 307; *Askew's case*, 3 *M. & S.* 9. In *Cauldwell's case*, 2 *Den. C. C. R.* 372 (*n*), *S. C.* 21 *L. J. M. C.* 48, the defendant had been convicted of perjury, and sentenced to seven years' transportation. On application on his behalf being made for a new trial, Campbell, C. J., inquired whether the defendant was present or in custody; and being answered in the negative, the court refused to hear the motion, the Chief Justice saying, "I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But there can be no such hardship when there is but one defendant. In this case peculiarly, the defendant ought to be in court. Sentence has been passed, which he has hitherto evaded; and the court will not permit him to make the experiment of obtaining a new trial, without coming into court to abide the consequences in case we should refuse the rule." Where the defendant is liable to a fine only, it is not necessary that he should be present in court. *Parkinson's case*, 2 *Den. C. C. R.* 459, *S. C.* 21 *L. J. M. C.* 48 (*n*).

No new trial can be had when the defendant is acquitted, although the acquittal was founded on the misdirection of the judge; *Cohen & Jacob's case*, 1 *Stark. N. P.* 516; *Sutton's case*, 5 *B. & Ad.* 52; or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a collateral issue which may have been found in favour of the defendant on insufficient evidence. *Lea's case*, 2 *Moo. C. C. R.* 9; 7 *C. & P.* 836, *S. C.*; 2 *Russ. by Grea.* 726. In *R.* v. *Russell*, 3 *E. & B.* 942, *S. C.* 23 *L. J. M. C.* 173, Coleridge, J., was of opinion, that whenever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for the defendant, on the ground either of misdirection or of the verdict being against the evidence: but Campbell, C. J., and Crompton, J., considered that the practice as to granting a new trial in a criminal case, after a verdict for the defendant, did not extend to the case where the defendant, if found guilty, might suffer fine and imprisonment: and they therefore held, that where an indictment charged the defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster-fishery was in question, the court ought not to grant a new trial after a verdict for the defendant.

Court of Criminal Appeal.] Formerly where any objection was taken on the part of the prisoner, during the course of the trial, which the judge considered well founded, it was usual to reserve the point for the consideration of the judges. Now, however, by 11 & 12 Vict. c. 78, it is enacted, by s. 1, "that when any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner, or justice of the peace, before whom the case

shall have been tried, may, in his or their discretion, reserve any question of law, which shall have arisen on the trial, for the consideration of the justices of either bench and barons of the Exchequer, and therefore shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

By s. 2, "That the judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and executions shall be thereupon executed on such judgment, and before the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge, and also the next court of oyer and terminer and gaol delivery, or sessions of the peace shall vacate the recognizance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at next sessions."

By s. 3, "That the jurisdiction and authorities by this act given to the said justices of either bench, and barons of the exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, of whom the lord chief justice of the court of

queen's bench, the Lord chief justice of the court of common pleas, and the lord chief baron of the court of exchequer, or one of such chiefs at least, shall be part, being met in the exchequer chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered."

By s. 4, "That the said justices and barons, when a case has been reserved for their opinions, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

The following rules were promulgated by the court of criminal appeal on the 1st June, 1850:—

That when any case shall be transferred by a court of oyer and terminer or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case signed by the judge, commissioner, or chairman of sessions reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party, shall be delivered to the clerk of this court at the Exchequer chamber at Westminster, at least four days before the day appointed for the sitting of the said court.

That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

That no case be heard upon any demurrer to the pleadings.

That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear to receive judgment, or to render himself in execution.

That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court.

That with every case delivered to the judges of the court (except such case as shall be reserved by such judge) the fee payable to the clerks of the said judges shall not exceed the fee payable on demurrer and other paper books, as contained in the table of fees allowed and sanctioned by the judges, pursuant to the statute 1 Vict. c. 30.

Upon this act of parliament it has been decided, that a recorder has power to reserve questions of law under it; *Masters's case*, 1 *Den. C. C. R.* 332; that the court is bound to examine the validity of the indictment, though no question be reserved upon it; *Webb's case*, 1 *Den. C. C. R.* 338, *S. C.* 18 *L. J. M. C.* 39; that a question raised in the court below in arrest of judgment, is a question arising "on the trial," and therefore properly reserved; *Morton's case*, 1 *Den. C. C. R.* 398, *S. C.* 18 *L. J. M. C.* 137; but that the court has no jurisdiction to hear a case stated from the court below on a judgment given on demurrer, for the court of criminal appeal has jurisdiction only after a conviction on trial by a jury; *Faderman's case*, 19 *L. J. M. C.* 147: nor *semble*, by Cresswell, J., has it power to

amend an indictment, and so make the jury a party to the finding; *Harris's case*, 1 *Dears. C. C. R.* 347.

With respect to the practice of the court, cases reserved should be submitted in a complete form, and the court will generally refuse to send back a case for amendment; *Holloway's case*, 1 *Den. C. C. R.* 370, *S. C.* 18 *L. J. M. C.* 61; the court will look at the indictment for the purpose of assisting their judgment, although it be not set out in the case; *Williams's case*, 2 *Den. C. C. R.* 61, *S. C.* 20 *L. J. M. C.* 106; but they will not consider an objection which has not been reserved, even though it be fairly deducible from the case itself, nor will they go into any matter of evidence which occurred at the trial, if it is not stated in the case; *Smith's case*, *Temp. & M.* 214, *S. C.* 14 *Jurist*, 92. Where there are two judges of assize, and the one of them who tries a criminal case, reserves a point for the consideration of the court of criminal appeal, but dies before the case is stated, the other judge may state and sign the case. *Featherstone's case*, 1 *Dears. C. C. R.* 369, *S. C.* 23 *L. J. M. C.* 127. The court has no power to order the costs of the prosecution incurred by the case being reserved. *Dolan's case*, 1 *Dears. C. C. R.* 445, *S. C.* 24 *L. J. M. C.* 59; *Hornsea's case*, 1 *Dears. C. C. R.* 291. In *Cluderoy's case*, 3 *C. & K.* 205, Williams, J., held that he had power, under the 7 Geo. 4. c. 64, s. 22, to allow the costs of the prosecution in arguing a case reserved.

Costs, expenses, and rewards.] As to the costs and expenses of the prosecutor and his witnesses in cases of felony, see *ante*, p. 114.

Where the prisoner, in a case of felony, was at large and did not appear, the expenses of the prosecutor and witness, who had been bound over to appear by the coroner, were allowed. *Flanning's case*, 1 *Lewin, C. C.* 133; *Anon. Id.* 134. Upon an indictment for felony, removed by *certiorari* into the King's Bench, and tried at nisi prius, no costs can be allowed under the statute either there or by the King's Bench. *R.* v. *Treasurer of Exeter*, 5 *Man. & Ry.* 167. Where the prisoner had been apprehended under a bench warrant, and neither the prosecutor nor any of the witnesses were under recognizance to prosecute or to give evidence, and only one of the latter had been subpœnaed; Parke, B., at first thought he could only grant the costs of the witness who had been subpœnaed; but on the following day his lordship said, that on comparing the words of the 7th Geo. 4, c. 64, s. 22, relating to felonies with those of the subsequent section relating to misdemeanors (s. 23), it appeared to him that the court had authority in prosecutions for felony to award the prosecutor his costs, even although he was not under any recognizance; and his lordship accordingly granted the costs of the prosecution generally, including those of the witnesses. *Butterwick's case*, 2 *Moo. & R.* 196.

It seems that in general no costs will be allowed before the trial has taken place; as when it is postponed. *Hunter's case*, 3 *C. & P.* 591. But in a case of murder, which was postponed until the following assizes, on the application of the prisoner, and in which the costs of the prosecution were very heavy, Alderson, B., made an order for their payment. *Bolam's case*, *Newc. Spr. Ass.* 1839, *MS.*

In misdemeanors, the expenses of witnesses who have not been subpœnaed, cannot be allowed; *Dunn's case*, 1 *C. & K.* 738; but they may where the witnesses have been subpœnaed; *R.* v. *Jeyes*, 3 *A. & E.* 416. It is doubtful, however, whether the costs of a prosecutor, not bound over to prosecute, can be granted. *Ib.* But if

his name be included in a subpœna they may. *R.* v. *Sheering*, 7 *C. & P.* 440. Where an indictment was removed from the sessions by *certiorari* at the instance of the prosecutor, and tried at nisi prius, and the prosecutor, who was not under recognizance, caused himself and his witnesses to be subpœnaed and paid their expenses, it was held that neither the court at nisi prius nor the King's Bench could give costs under the 7 Geo. 4, c. 64, s. 23. *Johnson's case*, 1 *Moo. C. C.* 173; *Richard's case*, 8 *B. & C.* 420. In the case of misdemeanors, not within the act, if the defendant submits to a verdict on an understanding that he shall not be brought up for judgment, the prosecutor is not, without a special agreement, entitled to costs. *Rawson's case*, 9 *B. & C.* 598.

The costs with regard to indictments for nuisances removed by *certiorari*, are regulated by the 3 W. & M. c. 11, s. 3, which enacts, that if a defendant prosecuting a writ of *certiorari* (as mentioned in the act) be convicted, the court of King's Bench shall give reasonable costs to the prosecutor, if he be a party grieved, or be a justice, &c., or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Persons dwelling near a steam-engine, which is a nuisance, have been held to be *parties grieved* within this act. *Dewsnap's case*, 16 *East*, 194. But a merely nominal prosecutor is not. *Reg.* v. *Barnard Castle*, 1 *Q. B.* 246. See also *Bishop's case*, 6 *D. & L.* 499, *S. C.* 18 *L. J. M. C.* 63; *Wilson's case*, 1 *El. & Bl.* 597, *S. C.* 22 *L. J. M. C.* 53; and *Anonymous cases*, 15 *Q. B.* 1060, *S. C.* 20 *L. J. M. C.* 53. The costs in cases of nuisances arising from the furnaces of steam-engines, are governed by the 1 & 2 Geo. 4, c. 41.

Mode of payment by the treasurer of the county, &c.] By the 7 Geo. 4, c. 64, s. 24, "Every order for payment to any prosecutor, or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor, or other person, upon being paid for the same the sum of one shilling for the prosecutor, and sixpence for each other person, and no more, and except in the cases therein after provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is thereby authorised and required, upon the sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

By the 14 and 15 Vict. c. 55, ss. 5 & 6, a Secretary of State may make regulations as to the costs, expenses, and compensations to be allowed, and these are to be ascertained according to such regulations.

With respect to places that do not contribute to any county rate.] The 7 Geo. 4, c. 64, s. 25, after reciting that "whereas felonies, and such misdemeanors as are thereinbefore enumerated, may be committed in liberties, franchises, cities, towns, and places, which do not contribute to the payment of any county rate, some of which raise a rate in the nature of a county rate, and others have neither any such rate, nor any fund applicable to similar purposes, and it is just that such liberties, franchises, cities, towns and places, should be charged with all costs, expenses, and compensations, ordered by virtue of this

act, in respect of felonies and such misdemeanors, committed therein respectively," enacts "that all sums directed to be paid by virtue of this act, in respect of felonies, and of such misdemeanors as aforesaid, committed, or supposed to have been committed in such liberties, franchises, cities, towns and places, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns and parishes, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein, where the offence was committed or supposed to have been committed, by the overseers or other officers having the collection or disbursement of such last mentioned rate or fund, and the order of the court shall in every such case be directed to such treasurer, overseers, or other officers respectively, instead of the treasurer of the county, riding, or division, as the case may require."

Expenses of prosecution for capital offences in exclusive jurisdictions.] By the 60 Geo. 3, c. 14, s. 3, "In all cases of any commitment to the county gaol, under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow, by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke, or place, within which such offence shall have been committed, in like manner, and to be raised by the same means whereby such expenses would have been raised and paid, if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction, and that the judge or court of oyer and terminer, and general gaol delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper, and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who, by the custom and usage of such place, ought to pay the same in the first instance."

Rewards for the apprehension of offenders.] By the 7 Geo. 4, c. 64, s. 28, "Where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessary before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to

the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient, to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to any court of sessions of the peace, to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such persons, in the same manner as the other courts herein before mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively." By the 14 & 15 Vict. c. 55, the power of the court of sessions, in this particular, is extended to all the offences mentioned in 7 Geo. 4, c. 64, s. 28, "which such sessions may have power to try;" and "provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

It was held by Hullock, B., that the case of *sacrilege* was not included in the above section, not coming within the words *burglary* or housebreaking. *Robinson's case*, 1 *Lewin*, *C. C.* 129. And on the authority of this case, Bolland, B., refused a similar application, though both he and Parke, J., would otherwise have been disposed to put a different construction upon the statute. *Ib.* But where a woman was indicted for an attempt to murder her child, by suffocating it, Patteson, J., allowed the constable his extra expenses in apprehending the prisoner, being of opinion that the case was within the spirit and intention of the foregoing clause, though not within the words. *Durkin's case*, 2 *Lew. C. C.* 163. It has been held, however, by Maule, J., that a stealing from the person is not within the words "robbery on the person." *R.* v. *John Thompson*, *York Spr. Ass.* 1845, *MS.* Under the word "exertions" in the above clause, Parke, B., ordered a prosecutor a gratuity of five pounds for his courage in apprehending the prisoner. *Womersly's case*, 2 *Lew. C. C.* 162.

By the stat. 7 Geo. 4, c. 64, s. 29, "Every order for payment to any person, in respect to such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings, and no more; and the sheriff of the county for the time being is hereby authorised and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorised on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

Allowance to the widows and families of persons killed in endeavouring to apprehend offenders.] By the 7 Geo. 4, c. 64, s. 30, "If

any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences herein before last mentioned [in sect. 28], it shall be lawful for the court before whom such person shall be tried, to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet: and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court, and every such order shall be paid by and repaid to the sheriff in the manner herein before mentioned," [in the 29th section].

The 4 & 5 Wm. 4, c. 36, s. 12, empowers the central criminal court to order the costs and expenses of prosecutors and witnesses, allowable under the 7 Geo. 4, c. 64, to be paid by the treasurer of the county in which the offence was committed.

By the 5 & 6 Wm. 4, c. 76, s. 113, all sums directed to be paid by the foregoing enactments of the 7 Geo. 4, c. 64, in respect of felony and such misdemeanors as therein mentioned, committed in any borough in which a separate quarter session shall be holden, shall be paid out of the borough fund, and the order of the court shall in such case be directed to the treasurer of such borough.

VENUE.

UNDER this head will be stated the various statutory provisions which have been made, with regard to the venue in different cases, and the decisions which have occurred upon the construction of those provisions. Some few general rules also relating to venue generally will be given. The law respecting venue in particular indictments will be found under the proper heads.

It may here be mentioned, that by the 2 & 3 Vict. c. 72, justices of assize may hold courts for a county at large, and also for any county of a city, county of a town, borough, or other jurisdiction locally situate within, or adjacent to, such county at large, in any court house, whether in or belonging to such county at large, or any such county of a city, &c.; and may from time to time adjourn such courts from the court house wherein they shall be then holding the same, to such other court house as they may deem convenient. But no court is to be held in any place more than three miles distant from the county, &c., for which such court is holden.

14 & 15 Vict. c. 100, s. 23.] By this section it is enacted, that "it shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: provided that, in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and, provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or

without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue."

Offences committed on the boundary of counties, or partly in one county and partly in another.] By the 7 Geo. 4, c. 64, s. 12 (repealing 59 Geo. 3, c. 96), "where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein." The Irish statute, 9 Geo. 4, c. 54, contains an exactly similar enactment.

It has been held, that this section does not extend to trials in limited jurisdictions, but only to county trials. *Welsh's case*, 1 *Moody, C. C.* 175. Nor does it enable the prosecutor to lay the offence in one county and try it in another; but only to lay and try it in either. *Mitchell's case*, 2 *Q. B.* 636. It applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies. *Ruck's case, Hereford Spr. Ass.* 1829; 1 *Russ. by Grea.* 827. The prisoner wrote and posted in a county a letter containing a false pretence to the prosecutor who received it in a borough. The prosecutor in the borough posted to the prisoner in the county a letter containing the money obtained by the false pretence, and which the prisoner received in the county. The court of criminal appeal held that the prisoner might be tried at the borough quarter sessions, part of the offence being the making of the false pretence, which was made to the prosecutor by the delivery to him of the letter containing the false pretence by the post office authorities, whom the prisoner had made his agents for that purpose. *Leech's case*, 25 *L. J. M. C.* 77.

Offences committed in detached parts of counties.] By the 2 & 3 Vict. c. 82, s. 1, justices of the peace for any county may act as justices in all things relating to any detached part of any other county, which is surrounded in whole or in part by the county for which such justices act, and all offenders in such detached part may be committed for trial, tried, convicted, and sentenced, and judgment and execution may be had upon them in like manner as if such detached part were to all intents and purposes part of the county for which such justices act.

By s. 2, the expenses of prosecuting offenders committed from the detached part of any county are to be repaid by the county to which such detached part belongs, in the manner therein prescribed.

It has been held that the grand jury of the county which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner may be tried by a jury of such surrounding county. The prisoner was indicted in Dorsetshire for larceny in a parish of Somersetshire, entirely detached from it, and surrounded in whole by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish of H., the same being a detached part of the county of Somerset, surrounded in the whole by the county of Dorset; the venue in the margin was Dorset. The indictment did not state that

the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. It was objected, first, that this should have appeared on the face of the indictment, and secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; and the 60 Geo. 3, c. 4, the 7 Geo. 4, c. 64, s. 12, and the 4 & 5 Wm. 4, c. 36, were referred to in order to shew that the word "try" in a statute did not include the finding of a bill by the grand jury. Rolfe, B., however, overruled the objection, saying that it would strike the act out of the statute book. *Loader's case*, 2 *Russ. by Grea.* 122.

Offences committed on persons or property in coaches employed on journeys, or in vessels employed in inland navigation.] The 7 Geo. 4, c. 64, s. 13, for the more effectual prosecution of offences committed during journeys from place to place, enacts, "that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed in any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof, such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties, through or adjoining to, or by the boundary of any part whereof, such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

The Irish statute, 9 Geo. 4, c. 54, contains a similar enactment.

The offence must be committed "in or upon the coach," to bring it within the above act; therefore, where a guard of a coach, on changing horses near Penrith, carried a parcel to a privy, and while there, took two sovereigns from it; Parke, B., held, that he must be tried in Westmoreland. *Sharpe's case*, 2 *Lew. C. C.* 233.

Offences committed in the county of a city or town corporate.] By the 38 Geo. 3, c. 52, s. 2, it shall be lawful for any prosecutor to prefer his bill of indictment for any offence committed or charged to be committed within the county of any city or town corporate, to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king for the body of such adjoining county, at any session of oyer and terminer, or general gaol delivery, and every bill of indictment found to be a true bill by such jury, shall be valid and effectual in law, as if the same had been found to be a true bill by any jury, sworn and charged to inquire for the king for the body of the county of such city or town corporate. And see 14 & 15 Vict., c. 100, s. 23, *ante*, p. 244.

If the indictment has been found by a grand jury of the county of

a city, &c., any court of oyer and terminer, or gaol delivery, may, at the prayer of the defendant, order the defendant to be removed by *habeas corpus* to the gaol of the next adjoining county, and the trial shall take place before a jury of such adjoining county. 38 Geo. 3, c. 52, s. 3. The court before which the offender is tried and convicted, may order the judgment to be executed either in the same county or in the county of a city in which the offence was committed. 51 Geo. 3, c. 100, s. 1. As to the expenses in these cases, see 38 Geo. 3, c. 52, s. 8; 51 Geo. 3, c. 100, s. 2; 60 Geo. 3, c. 14, s. 3; 7 Geo. 4, c. 64, s. 25; 5 & 6 Wm. 4, c. 76, s. 113, 114.

Where an application was made under the above statute, to have an indictment for a misdemeanor, found by a grand jury of the county of the city of York, tried in the county of York, Parke, J., was of opinion that it would be necessary for the bail to surrender the defendant to the custody of the city gaoler, and that a *habeas corpus* should then issue to bring up the body, and that the judge should then commit him to the county gaol. The clerk of the arraigns produced the indictment and recognizances, and the judge (pursuant to the terms of the act) made an order to have them filed amongst those of the county. *Roubattel's case*, 1 *Lewin, C. C.* 278.

London, Westminster, and the borough of Southwark are excepted out of the 38 Geo. 3, c. 52; but so much of that statute as also excepted Bristol, Chester, and Exeter, is repealed by the 5 & 6 Wm. 4, c. 76, s. 109. By the latter act, Berwick-upon-Tweed is to be taken to be a town corporate, within the 38 Geo. 3, c. 52.

An important alteration has been made in the boundaries of some counties by the boundary act 2 & 3 Wm. 4, c. 54, and the municipal reform act, 5 & 6 Wm. 4, c. 76, so that, if a felony be now committed in that part of the county of a town which has been added to it by the boundary act and the municipal reform act, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm. The offence was committed at a place, which was added to the borough of Haverfordwest, which is a county of itself by the boundary act, and declared by the municipal reform act to be part of the borough, the place in question not having been within the borough before the passing of those acts. It was held by Coleridge, J., that the prisoner might be tried by a jury of the borough. *Piller's case*, 7 *C. & P.* 337. In *R.* v. *the Just. of Gloucestershire*, 4 *A. & E.* 689, it was held that the effect of these statutes was to transfer the party entirely and for all purposes out of one county into the other. 2 *Russ. by Grea.* 120.

Offences committed at sea, or within the jurisdiction of the admiralty.] The 28 H. 8, c. 15, (and the 11, 12 & 13 Jac. 1, c. 2, I.) enacts that "all treasons, felonies, robberies, murders, and confederacies thereinafter to be committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have, or pretend to have, power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same in the like form and condition, as if such offence or offences had been committed or done in or upon the land."

This statute being thought not to extend to felonies created subsequently by statute, the following act was passed to provide for those cases.

By the 39 Geo. 3, c. 37, s. 1, all and every offence and offences,

which, after the passing of that act, shall be committed upon the high seas, out of the body of any county of this realm shall be, and they are declared to be of the same nature respectively, and to be liable to the same punishment respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be tried by the 26 H. 8.

By the larceny act, 7 & 8 Geo. 4, c. 29, s. 77, where any felony or misdemeanor, punishable under that act, shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction. Similar provisions are contained in the malicious injuries act, 7 & 8 Geo. 4, c. 30, s. 43, the act providing for offences against the person, 9 Geo. 4, c. 31, s. 32, and the recent statutes of the 11 Geo. 4, and 1 Wm. 4, c. 66, s. 27; 7 Wm. 4, and 1 Vict. c. 85, s. 10; 7 Wm. 4, and 1 Vict. c. 86, s. 10; 7 Wm. 4, and 1 Vict. c. 87, s. 13; and 7 Wm. 4 and 1 Vict. c. 89, s. 14.

It is often a question of some difficulty, whether an offence was committed within the jurisdiction of the admiralty. With regard to the sea shore, it is clear that the common law and the admiralty have alternate jurisdiction between high and low water mark. 3 *Inst.* 113, 2 *Hale, P. C.* 17. Therefore, if a man be wounded on the sea, or a creek of the sea, at high-water, and on the reflux of the tide dies on the spot which the water had covered, the admiralty has no jurisdiction of this felony. *Lacie's case*, 2 *Hale, P. C.* 19; *Bingham's case*, 2 *Co.* 93, *a.*

The following authorities, collected by Mr. East, are referred to by Mr. Serjeant Russell, as containing the general rules upon the subject of the admiralty jurisdiction. In general, it is said that such parts of the rivers, arms, and creeks are deemed to be within the bodies of counties, where persons can see from one side to the other. Lord Hale, in his treatise *De Jure Maris*, says, that the arm or branch of the sea, which lies within the *fauces terræ, where a man may reasonably discern between shore and shore*, is, or at least may be within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea, where a man standing on the one side of the land may see what is done on the other, and the reason assigned by Lord Coke in the admiralty case (13 *Co.* 52), in support of the county coroner's jurisdiction, when a man is killed in such places, *because the county may well know it*, seems rather to support the more limited construction. But, at least when there is any doubt, the jurisdiction of the common law ought to be preferred. 2 *East, P. C.* 804; 1 *Russ. by Grea.* 101.

In the following case the common law and the admiralty were held to have concurrent jurisdiction in a haven. A murder was committed in Milford Haven, seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, and the place itself about twenty-three feet deep, and never known *to be dry but at very low tides.* Sloops and cutters of one hundred tons were able to navigate where the body was found, and nearly opposite the place men-of-war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven. The judges were unanimously of opinion that the trial was rightly had at the ad-

miralty sessions, though the place was within the body of the county of Pembroke, and the courts of common law had concurrent jurisdiction. During the discussion, the construction of the statute 28 H. 8. c. 15, by Lord Hale, was much preferred to the doctrine of Lord Coke in his Institutes (3 *Inst.* 111, 4 *Inst.* 134), and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers of this realm. *Bruce's case*, 2 *Leach*, 1093; *Russ. & Ry.* 243; *Anon.* 1 *Lewin, C. C.* 242.

The central criminal court act, 4 & 5 Wm. 4, c. 36, s. 22, enacts, "that it shall and may be lawful for the justices and judges of oyer and terminer, and gaol delivery, to be named in and appointed by the commission to be issued under the authority of the act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed, on the high seas, or other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to, or detained therein, for any offence or offences alleged to have been done or committed upon the high seas within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had and taken by and before the said justices and judges shall be valid and effectual to all intents and purposes whatsoever." The same section enables the justices and judges to order the payment of costs in the manner prescribed by the 7 Geo. 4, c. 64, *ante*, p. 241. Where a prisoner was convicted at the central criminal court of larceny out of a vessel lying in a river at Wampu, in China, twenty or thirty miles from the sea, the prosecutor gave no evidence as to the tide flowing or otherwise where the ship lay, but the judges held that the conviction was right, the place being one where great ships go. *Allen's case*, 1 *Moo. C. C.* 494.

By the 7 Vict. c. 2, s. 1, justices of oyer and terminer may try all offences alleged to have been committed on the high seas and other places within the jurisdiction of the admiralty of England, and may deliver the gaol in every county within the limits of their several commissions, of any person committed to or imprisoned therein for such offences, and the court may grant the costs of the prosecution in the manner prescribed by the 7 Geo. 4, c. 64, *ante*, p. 241.

By s. 2, the venue in the margin is to be the same as if the offence had been committed in the county where the trial is had, and all material facts, which in other indictments would be averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried under this act, be averred to have taken place "on the high seas."

An indictment under this statute need not aver that the offence was committed "within the jurisdiction of the admiralty." *R.* v. *Jones*, 1 *Den. C. C. R.* 101.

By s. 3, justices are to commit persons for offences within the jurisdiction of the Admiralty, to the same prison to which they would have been committed for trial at the next court of oyer and terminer and gaol delivery, if the offence had been committed on land: they are also to bind over the witnesses, and to return the recognizances to the court where the trial is to be, and every such offender shall be tried as if the offence had been committed within the county where the court is holden.

By s. 4, the act is not to affect the jurisdiction of the central cri-

minal court in admiralty offences, or to restrain the issue of special commissions under the 28 Hen. 8, c. 15.

By the 8 & 9 Vict. c. 87, s. 95, offences committed upon the high seas against this or any other act relating to the customs, &c. shall, for the purpose of prosecution, be taken to have been committed at the place on land in the United Kingdom, or the Isle of Man, into which the person committing such offence shall be taken, brought, or carried, or in which such person shall be found; and in case such place or land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, &c., as any justice of the peace of the county within which such city, &c. is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas; provided that where any offence shall be committed in any place upon the water, not being within any county of the united kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purpose of this act, be taken to be an offence committed upon the high seas. See *R.* v. *Nunn*, 8 *B.* & *C.* 644; 3 *M.* & *R.* 75.

Offences against the excise, customs, stamps, &c.] In indictments for resisting or assaulting officers of the excise, 7 & 8 Geo. 4, c. 53, s. 43, or for offences relating to the customs, 8 & 9 Vict. c. 87, s. 136, the venue may be laid in any county in England, where the offence is committed in England, and in any county in Ireland, where committed in that country. As to offences against the customs committed on the high seas, see *supra.*

In indictments for offences against the stamp duties, the venue may be laid, either in the county where the offence was committed, or in the county in which the parties accused or any of them shall have been apprehended. 53 Geo. 3, c. 108, s. 21.

Venue and jurisdiction of the central criminal court.] By the 4 & 5 Wm. 4, c. 36, s. 2, the jurisdiction of the central criminal court extends over all offences committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, St. Mary Woodford, and Chingford, in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the said county of Kent, the liberty of Kidbrook and the hamlet of Mottingham in the county of Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, and that part of St. Paul Deptford which is within the said county of Surrey, Tooting Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the clink liberty, and the district of Lambeth palace, in the county of Surrey.

By s. 3, the district situated within the limits of the jurisdiction thereinbefore established is to be deemed one county for all purposes of venue, local description, trial, judgment, and execution not therein specially provided for; and in all indictments and presentments the venue laid in the margin shall be "Central Criminal Court, to wit," and all offences and material facts are to be laid to have been com-

mitted and averred to have taken place "within the jurisdiction of the said court:" and see also 9 & 10 Vict. c. 24.

Where an indictment for misdemeanor was preferred at the central criminal court, and the marginal venue was "Central Criminal Court, to wit," and in the body of the indictment the facts were stated to have taken place "at the parish of St. Mary, Lambeth, Surrey, within the jurisdiction of the said court," and the indictment was removed by *certiorari*, it was held that the trial must be at the assizes for Surrey. *Connop's case*, 4 *A. & E.* 942. See also, as to the venue of the central criminal court. *Reg.* v. *Gregory*, 1 *Cox, C. C.* 198; *S. C.* 14 *L. J. M. C.* 82.

An indictment for misdemeanor found at the central criminal court had in the margin the words, "Central Criminal Court," and stated that M. A., "late of the parish of *St. Stephen, Coleman-street*, in the city of *London*, and within the jurisdiction of the said court, labourer," intending, &c., on, &c., "at the parish aforesaid, and within the jurisdiction," &c., unlawfully, &c.; alleging the offence without further statement of venue. The indictment was removed by *certiorari* and tried in London, and the defendant was convicted. On motion in arrest of judgment; *Semble*, that the venue assigned to the material fact appeared sufficiently to be in the city of London; and it was held, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by the 7 Geo. 4, c. 64, s. 20, for that the indictment showed jurisdiction in the court at nisi prius to try the case in London. *Reg.* v. *Albert*, 5 *Q. B.* 37. An indictment was laid in the central criminal court, the venue in the margin being, "Central Criminal Court, to wit," and the material facts being laid only as having taken place "within the jurisdiction of the said court." The defendant having removed it by *certiorari*, was tried at nisi prius in Middlesex and found guilty. The court of Q. B. arrested the judgment, the description of place not being made sufficient by the 4 & 5 Wm. 4, c. 36, s. 3, in cases not tried at the central criminal court, and the defect not being cured by the 7 Geo. 4, c. 64, s. 20, the nisi prius court not appearing "by the indictment," "to have had jurisdiction over the offence." The court refused after verdict to enter a suggestion for a trial in Middlesex, *nunc pro tunc*. And *semble*, such an application would not be granted at any period. An indictment preferred in the central criminal court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And if that has not been done, it should be made a condition of the removal by *certiorari* that the defendant consent to the insertion. *R.* v. *Stowell*, 5 *Q. B.* 44; and see also *Gregory's case*, 7 *Q. B.* 274; *Hunt's case*, 10 *Q. B.* 925; *S. C.* 17 *L. J. M. C.* 14; and *Smythies's case*, 1 *Den. C. C. R.* 498; *S. C.* 19 *L. J. M. C.* 31. By the 19 Vict. c. 16, the court of Queen's Bench has power to order certain offenders, against whom indictments have been found, for felonies or misdemeanors committed out of the jurisdiction of the central criminal court, and which indictments have been removed by *certiorari*, to be tried at the central criminal court. See *post*, p. 252.

Want of a proper venue, when cured.] By the 7 Geo. 4, c. 64, s. 20 (the 9 Geo. 4, c. 34, s. 31, I.), no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the

court shall appear by the indictment or information to have had jurisdiction over the offence. Though this act cures a wrong venue, it does not cure a venue into a wrong county. *Mitchell's case*, 2 *Q. B.* 636, *ante*, p. 246. The 14 & 15 Vict. c. 100, s. 24, also enacts, that "no indictment for any offence shall be held insufficient for want," *inter alia*, "of a proper perfect venue."

Effect of a total omission of venue.] In an indictment for a misdemeanor, a count containing no statement of venue, either by reference or otherwise, is bad at common law after verdict, but a venue stated as usual in the margin of the indictment, is now sufficient. 14 & 15 Vict. c. 100, s. 23, *ante*, p. 245.

Change of venue.] As already mentioned, *ante*, p. 230, where a fair and impartial trial cannot be had in the county where the venue is laid, the court of King's Bench (the indictment being removed thither by *certiorari*) will, upon an affidavit stating that fact, permit a suggestion to be entered on the record, so that the trial may be had in an adjacent county. Good ground must be stated in the affidavit, for the belief that a fair trial cannot be had. *Clendon's case*, 2 *Str.* 911; *Harris's case*, 3 *Burr.* 1330; 1 *W. Bl.* 378. The suggestion need not state the facts from which the inference is drawn, that a fair trial cannot be had. *Hunt's case*, 3 *B. & A.* 444. This suggestion when entered is not traversable. 1 *Chitty Crim. Law*, 201. And the venue in the indictment remains the same, the place of trial alone being changed. *Ibid.* It is only, however, in case of misdemeanor, that the court of King's Bench will, in general, award a *venire* to try in a foreign county, though cases may occur in which the court would change the venue in felony. *Holden's case*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167. And even in cases of misdemeanor, the court has not exercised its discretionary power, unless there has been some peculiar reason, which made the case almost one of necessity. *Ib.* Upon an indictment for a misdemeanor, the application to change the venue ought to be made before issue joined. *Forbes's case*, 2 *Dowl. P. C.* 440.

The 19 Vict. c. 16, s. 1, provides, that "whenever any indictment or inquisition for any felony or misdemeanor committed, or supposed to have been committed, at any place out of the jurisdiction of the said Central Criminal Court, shall have been removed by writ of *certiorari* into her majesty's Court of Queen's Bench, either before or after the passing of this act, and it shall appear to such court in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such indictment or inquisition shall be tried at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or for such judge thereof in vacation, to order that such indictment or inquisition shall be tried at the said Central Criminal Court."

With reference to the course to be taken by the court from which any writ of *certiorari* removes an indictment, s. 8 of the same statute enacts, that "whenever any writ of *certiorari* shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, such court shall require any person who shall be attending such court, under any recognizance or subpœna, to prosecute, or to prosecute and give evidence, or to give evidence, upon the trial of such indictment or inquisition, to enter into a recognizance in such sum of money as to

such court shall seem fit, to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, upon the trial of such indictment or inquisition, whenever and wherever the same may be tried." And sect. 9, enacts, "whenever any writ of *certiorari* shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, it shall be lawful for such court either to require any person, who shall be attending such court under any recognizance, to take his trial upon such indictment or inquisition, to enter into such recognizance, with so many sureties, and in such sum or sums of money, and with such condition for his appearance and taking his trial upon such indictment or inquisition, whenever and wherever the same shall be tried, as to such court shall seem fit, or to commit such person to the common gaol or house of correction for the county or place for which such court shall be holden, there to remain until he shall be removed under the provisions of this act, or otherwise delivered by due course of law."

EVIDENCE IN PARTICULAR PROSECUTIONS.

ABDUCTION.

At common law.] It is stated to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children be taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices (as by intoxication), for the purpose of marrying them, though the parties themselves may be consenting to the marriage, such criminal means will render the act an offence at common law. 1 *East, P. C.* 458, 459; 1 *Russ. by Grea.* 701; 3 *Chit. Crim. L.* 713. So, seduction may take place under such circumstances of combination and conspiracy, as to render it an indictable offence. *Lord Grey's case*, 3 *St. Tr.* 519; 1 *East, P. C.* 460; 1 *Russ. by Grea.* 701; *Mears's case*, 2 *Den. C. C. R.* 79.

By statute.] The offence of abduction was provided against by the 3 Hen. 7, c. 2, 39 Eliz. c. 9, 4 & 5 P. & M. c. 8, and 1 Geo. 4, c. 115; but those statutes were repealed, and their provisions consolidated by the 9 Geo. 4, c. 31.

The 19th section of that statute enacts, that "where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate; or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without

hard labour, in the common gaol or house of correction, for any term not exceeding four years.

The Irish statute, 10 Geo. 4, c. 34, s. 22, enacts, that if any person shall, by force, take away any woman or girl against her consent, with intent that such person or any other person shall marry or defile her, every such offender, and every accessary thereto before the fact, shall be guilty of felony, and suffer death as a felon, and every accessary thereto after the fact shall be guilty of felony, and be liable to be transported for life or for not less than seven years, or to be imprisoned with or without hard labour for any term not exceeding three years. The 5 & 6 Vict. c. 28, s. 15, after reciting the above section, enacts, that any person convicted of the said offence shall not suffer death, or have sentence of death awarded against him, but shall be transported for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years. By s. 19, such imprisonment may, according to the discretion of the court, be with or without hard labour and solitary confinement, such solitary confinement not exceeding one month at one time, nor three months in a year. By s. 18, a principal in the second degree, or accessary before the fact, is punishable as an accessary in the first degree.

Upon an indictment under the above statute of the 9 Geo. 4, c. 81, s. 19, the prosecutor must prove—1, the taking away or detaining of the woman against her will.—2, that the woman had such an interest as is specified in the statute.—3, that the taking away or detaining, was from motives of lucre.—4, the intent to marry or defile.

Proof of the taking away or detaining against the will, &c.] The 3 Hen. 7, c. 2, like the 9 Geo. 4, uses the words, "take against her will," and upon those words, it has been held, that getting a woman inveigled out by confederates, and detaining her, and taking her away, is a taking within the statute of Hen. 7. Thus, where a confederate of the prisoner inveigled a girl of fourteen, having a portion of 5000*l.*, to go with her and a maid-servant in a coach into the Park, where the prisoner got into the coach, and the two women got out, and the prisoner detained the girl while the coach took them to his lodgings in the Strand; where, the next morning, he prevailed upon her, by threatening to carry her beyond seas, in case she refused, to marry him (though there was no evidence that she was deflowered), the prisoner was convicted and executed. *Brown's case*, 1 *Ventr.* 243; 1 *Russ. by Grea.* 703. So it is said, that it is no manner of excuse that the woman at first was taken away with her own consent, because, if she afterwards refuses to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be *taken* against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. *Hawk. P. C. b.* 1, *c.* 41, *s.* 7; 1 *East, P. C.* 454. This would probably be now considered as a "detaining" within the 9 Geo. 4, c. 31. See also *Wakefield's case, Murray's ed.*

Proof of the woman's interest.] The prosecutor must prove that the woman was interested in real or personal estate, according to the allegation in the indictment, or that she was the heiress or next of kin to some one having such interest. Evidence of this fact must be given in the usual way, and possession either of real or personal estate will be *primâ facie* evidence of interest. To prove that the

party is heiress, or next of kin, one of the family, or some one acquainted with the family, may be called.

Proof that the offence was committed from motives of lucre.] That the party was guilty of the offence from motives of lucre, will in general be gathered from the whole circumstances of the case. Proof that there was little or no previous intercourse between the parties, will tend to establish this part of the case. So, that the offender was in needy circumstances, or that he has made declarations tending to show the object with which he committed the crime. Thus, in *Lockart Gordon's case*, 1 *Russ. by Grea.* 707, it was proved that the prisoner was pressed for money, and backward in his payments; and that he had admitted to one of the witnesses that he was in distressed circumstances. See *Wakefield's case*, 2 *Lew. C. C.* 279; also *Barratt's case*, 9 *C. & P.* 387, where Parke, B., said to the jury, "I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *R.* v. *Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument, that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of the charge of felony. * * * With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of Miss Ellis, such as his having told one of the witnesses that he had seen Mr. Whitwell's will, and that she would be entitled to 200*l.* a year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not."

Proof of the intent to marry or defile.] Under the 3 Hen. 7, it was necessary that there should be a marriage or defilement, the taking alone not being sufficient; *And.* 115; *Cro. Car.* 486; 1 *Russ. by Grea.* 703; and it was not necessary to aver an intent to marry or defile; *Fullwood's case*, *Cro. Car.* 482; nor was it material whether the woman was at last married or defiled with or without her consent, if she were under force at the time of the taking, for such construction was equally within the words and meaning of the statute, (3 Hen. 7,) which was to protect the weaker sex from both force and fraud. Upon an indictment under the 9 Geo. 4, c. 31, however, it is not necessary to prove either a marriage or defiling, but only *an intent* to marry or defile, which, like the averment of "motives of lucre," will in general appear from the whole circumstances of the case. In an indictment under the 9 Geo. 4, c. 31, however, an allegation as to the intent will be necessary. 1 *Russ. by Grea.* 709.

Abduction of girls under sixteen.] The offence of taking away a maid or woman child unmarried, under the age of sixteen, from the custody of her father, &c., was formerly provided for by the 4 & 5 P. & M. c. 8, s. 2 and 3 (now repealed) and was likewise, as it seems, an offence at common law. *Hawk. P. C. b.* 1, *c.* 41, *s.* 8. And the 9 Geo. 4, c. 31, s. 20, enacts, "that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father and mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being

convicted thereof, shall be liable to suffer such punishment by fine or imprisonment, or by both, as the court shall award."

Upon an indictment for this offence, the prosecutor must prove,— 1, the taking of the girl (and that she is under sixteen) out of the possession of her father, &c.; 2, that it was against the will of the father, &c. It will be observed, that neither motives of lucre, nor an intent to marry or defile, are made constituent parts of this offence, as in the preceding section of the act.

Proof of the taking of the girl out of the possession of the father, &c.] It has been held that an illegitimate child is within the protection of the 4 & 5 P. & M. *Cornforth's case*, 2 *St.* 1162; *Hawk. P. C. b.* 1, *c.* 41, *s.* 14. And the same would be held under the new statute. The taking away may be effected, either by force or fraud, or by obtaining the consent of the girl herself to leave her father, &c. Thus it is said by Herbert, C. J., that the statute (of P. & M.) was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way to their disparagement. *Hicks* v. *Gore*, 3 *Mod.* 84. So it is no excuse that the defendant being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the girl secretly to elope and marry him, if it appear that it was against the consent of the father. *Twisleton's case*, 1 *Lev.* 257; 1 *Sid.* 387; 2 *Keb.* 432; *Hawk. P. C. b.* 1, *c.* 41, *s.* 10; 1 *Russ. by Grea.* 712.

It would seem according to the opinion of Gurney, B., that where a man by false and fraudulent representations, as by representing that he wished to place her in the service of a lady, induced the parents of a girl, between ten and eleven years of age, to allow him to take her away, such taking away was an abduction within the meaning of the statute. The learned judge intended to have reserved the case for the consideration of the judges, but the prisoner being convicted on another indictment, prevented the necessity of his doing so. *R.* v. *Hopkins*, *Carr. & M.* 264. Where A. went in the night to the house of B. and placed a ladder against a window and held it for F., the daughter of B. to descend, which she did, and then eloped with A.; F. being a girl under sixteen, viz. fifteen years old; this was held to be a "taking" of F. out of the possession of her father, within the statute, although F. had herself proposed to A. to bring the ladder, and elope with him. It was held also that it was no defence for A. that he did not know that F. was under sixteen, or that from her appearance he might have thought she was of a greater age. *R.* v. *Robins*, 1 *C. & K.* 456. In *Meadow's case*, 1 *C. & Kir.* 399, a girl under sixteen was in service, and having been sent on an errand, was returning to her mistress's house, when she was met by B. a former companion and schoolfellow, who representing that her mother wanted a servant and would engage her, induced her to accompany her to London. Parke, B., held that this was not an offence under the statute. But in *Manktelow's case*, 1 *Den. C. C. R.* 159; *S. C.* 22 *Law J.*, *M. C.* 115, where the prisoner intending to emigrate to America had privately persuaded a girl between twelve and thirteen years of age to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two travelled up to London

together; this was held to be a "taking" under the statute; Parke, B., stating that the marginal note in *Meadow's case* was not warranted by the facts proved at the trial. Jervis, C. J., in delivering judgment said: "There are two points in this case. The first turns on the construction of the word 'take' in the statute. It is contended for the prisoner that the word 'take' must mean taking by force, actual or constructive. But a comparison of the sections shows that that is not necessary. It is unimportant under the section on which this indictment was framed whether the girl consented or not to go away with the man. There can be no question upon the facts stated in this case, that when the prisoner met the girl at the appointed place, there was then a taking of her. The statute was framed for the protection of parents. Then we come to the second point, whether she was taken out of the possession of the father. According to the opinion of my brother Maule, in *R.* v. *Kipps*, 4 *Cox*, *C. C.* 167, it is not necessary that there should be an actual possession by the father. So long as she continues a member of her father's family, and is under his control, she is in his possession. The facts of this case show that there was a continuing possession by the father. The girl by the prisoner's persuasion left her father's house for the particular purpose of meeting the prisoner. If she had not met him she would have returned home. The possession of the father was therefore only conditionally renounced. By the act of taking, the prisoner severed the connection between the girl and her father, and so took her out of his possession." This is in accordance with the decision of Maule, J., in *R.* v. *Kipps*.

Proof of the want of consent of the father, &c.] The prosecutor must prove the want of consent of the father or mother, or other person having the lawful care or charge of the girl. Upon the death of the father, the mother retains her lawful authority over the child, notwithstanding a second marriage, and the consent of the second husband is immaterial. *Ratcliffe's case*, 3 *Rep.* 39. Whether where a girl under sixteen is placed by the father and mother under the temporary care of another, by whose collusion, and with whose consent she is taken away and married, it will be an offence within the statute, does not appear to be well decided. The following case arose upon the statute of Philip and Mary. A widow fearing that her daughter, a rich heiress, might be seduced into an imprudent marriage, placed her under the care of a female friend (Lady Gore), who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she had attained the age of sixteen, and without the consent of her mother, who was her guardian. It was held by Herbert, C. J., that in order to bring the offence within the statute, it must appear that some artifice was used; that the elopement was secret, and the marriage to the disparagement of the family. *Hicks* v. *Gore*, 3 *Mod.* 84; *Hawk. P. C. b.* 1, *c.* 41, *s.* 11. In this case it is to be noted, says Mr. East, that the mother had placed the child under the care of Lady Gore, by whose procurance the marriage was effected; but nothing is stated in the report to show that the chief justice laid any stress on that circumstance. And in truth, it deserves good consideration before it is decided, that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute; for then every schoolmistress might dispose of the children committed to

her care, though such delegation of a child for a particular purpose be no delegation of the power of disposing of her in marriage: but the governance of the child in that respect may still be said to remain in the parent. 1 *East, P. C.* 457. There must be a continuous want of consent on the part of the parent, for if the consent be once given, it cannot, it is said, be revoked; *Calthorpe* v. *Axtell*, 3 *Mod.* 169: *Hawk. P. C. b.* 1, *c.* 41, *s.* 13. But this was not the point in judgment, and it has been observed, that it wants further confirmation. 1 *Russ. by Grea.* 702.

ABORTION.

Offence at common law.] A CHILD *en ventre sa mere*, cannot be the subject of murder, *vide post*, *Murder*. At common law an attempt to destroy such a child appears to have been held to be a misdemeanor. 3 *Chitt. Cr. Law*, 798; 1 *Russ. by Grea.* 671.

If, however, with the attempt to procure abortion a person does an act whereby a living child is brought into the world immaturely, and who dies in consequence, that would be murder in the person doing the act. *Per Maule, J., in West's case*, 2 *C. & K.* 781.

Statute law.] By the 7 Wm. 4 and 1 Vict. c. 85, (E. & I.) s. 6, "whosoever with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By sec. 8, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year as to the court in its discretion shall seem meet."

Upon an indictment under the above act, the prosecutor must prove, the administering, or causing to be taken, of some poison or other noxious thing, with intent to procure miscarriage, or the use of some instrument, or other means, with the like intent.

Proof of the administering.] Where the prisoner gave the prosecutrix a cake containing poison, which she merely put into her mouth, and spit out again without swallowing any portion of it; the judges held, that a mere delivery did not constitute an administering within the 43 Geo. 3, c. 58, and that there was no administering unless the poison was taken into the stomach. *Cadman's case, Carr. Supp.* 237.

And see *Harley's case*, 4 *C. & P.* 370, where the report of this case in 1 *Moo. C. C.* 114 is stated to be inaccurate. But to constitute an administering there need not be an actual delivery by the hand of the prisoner. *Harley's case, supra.*

Upon an indictment under this section it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute. *Harriett Wilson's case* (November 22, 1856), 5 *Weekly Rep.* 70.

Proof of the nature of the thing administered.] The nature of the poison or other noxious thing must be proved. Upon an indictment on the 43 Geo. 3, c. 58, s. 2, for administering *savin* to a woman not quick with child, with intent, &c., the charge was that the prisoner administered "six ounces of the *decoction* of a certain shrub called *savin* then and there, being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called an *infusion* and not a decoction. It was objected that the medicine was misdescribed, but Lawrence, J., overruled the objection. He said *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered *any matter or thing* to the woman with intent to procure abortion. *Phillips's case*, 3 *Campb.* 78. The authority of this decision appears to have been recognised by Vaughan, B., in the following case. The prisoner was indicted under the 9 Geo. 4, c. 31, s. 13, for administering saffron to the prosecutrix, with intent to procure abortion. The counsel for the prisoner cross-examining as to the innocuous nature of the article administered, Vaughan, B., said, "does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of parliament." *Coe's case*, 6 *C. & P.* 403. It should be observed, that the words of the statute were the same as those used in the 7 Wm. 4 and 1 Vict. c. 85, s. 6, "any *poison* or other *noxious thing*," or "any instrument or *other means* whatsoever."

The former statutes on this subject, the 43 Geo. 3, c. 58, and 9 Geo. 4, c. 51, s. 14, distinguished between the case where the woman was quick and was not quick with child, and under both acts the woman must have been pregnant at the time. See *Scudder's case*, 3 *C. & P.* 605; 1 *Moo. C. C.* 216. The terms of the recent act are "with intent to procure the miscarriage of any woman," omitting the words "being then quick with child," &c.; and it is immaterial whether the woman is or is not pregnant, if the prisoner, believing her to be so, administers the drug, or uses the instrument, with the intent of producing abortion. *Goodhall's case*, 1 *Den. C. C. R.* 187.

Proof of the intent.] The intent will probably appear from the other circumstances of the case. That the child was likely to be born a bastard, and to be chargeable to the reputed father, the prisoner, would be evidence to that effect. Proof of the clandestine manner in which the drugs were procured or administered would tend to the same conclusion.

AFFRAY.

An affray is the fighting of two or more persons in some public place, to the terror of the king's subjects; for if the fighting be in private, it is not an affray, but an assault. 4 *Bl. Com.* 145. See *Timothy* v. *Simpson*, 1 *Cr.*, *M.* & *R.* 757. It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair, or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. *Hawk. P. C. b.* 1, *c.* 65, *s.* 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. *Vide post.* Mere quarrelsome words will not make an affray. 4 *Bl. Com.* 146; 1 *Russ. by Grea.* 292.

To support a prosecution for an affray, the prosecutor must prove—1, the affray, or fighting, &c.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

The principals and seconds in a prize fight were indicted in one count for a riot, and in another for an affray. The evidence was, that the two first prisoners had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end. The prisoners, on being required to do so, quietly yielded. Alderson, B., said, it seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this:—Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault but nothing more. *Hunt's case*, 1 *Cox*, *C. C.* 177; and see *Brown's case*, *Car.* & *M.* 314.

The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment will be proportionally increased. 4 *Bl. Com.* 145; 1 *Hawk. P. C.* *c.* 63, *s.* 20; 1 *Russ. by Grea.* 296.

ARSON.

At common law.] THE offence of arson, which is a felony at common law, is defined by Lord Coke to be the malicious and voluntary burning the house of another, by night or by day. 3 *Inst.* 66; 1 *Hale, P. C.* 566.

Upon an indictment for this offence, the prosecutor must prove—1, the burning; 2, of the house of another; 3, that the offence was committed voluntarily and maliciously.

Proof of the burning.] To constitute arson at common law, it must be proved that there was *an actual* burning of the house, or of some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance, but be put out or go out of itself. 2 *East, P. C.* 1020; 1 *Hale, P. C.* 569. The *setting fire* to the house of another, maliciously to burn it, is not at common law a felony, if either by accident or timely prevention, the fire does not take place. 1 *Hale, P. C.* 568; but it is now made a felony by statute 9 & 10 Vict. c. 25, s. 7.

Proof that the house, &c. burnt, is the house of another.] In order to constitute the felonious offence of arson at common law, the fire must burn *the house* of *another*. The burning of a man's own house is no felony at common law, but such burning in a town, or so near to other houses as to create danger to them is at common law a great misdemeanor. 1 *Hale, P. C.* 568; 2 *East, P. C.* 1027. And if a man set fire to his own house maliciously intending thereby to burn the adjoining house, belonging to another, if the latter house is

burned, it is felony; if not it is a great misdemeanor. 1 *Hale, P. C.* 568; 2 *East, P. C.* 1031; and although the primary intention of the party were only to burn his own house, yet if, in fact, others were burnt, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and malicious, and the consequence immediately and necessarily flowing from the original act done, it is felony. See 2 *East, P. C.* 1031; and *Probert's case*, there cited.

The offence may be committed, not only with regard to a dwelling-house, but also with regard to all outhouses which are parcel of it, though not contiguous, or under the same roof, as in the case of burglary at common law. 1 *Hale, P. C.* 567. And at common law, to burn a barn or outhouse, though not parcel of a dwelling-house, was felony, if it had hay or corn in it. *Id.* The various descriptions of buildings and farming stock are, however, now expressly protected by statute, *vide post*: and it will not therefore be necessary to examine how far they come within the protection of the common law.

With regard to what constitutes a man's *own house*, that appears to be the actual and immediate possession of the house with an interest in it: it has therefore been held that a tenant for years of a house cannot at common law be guilty of a felony by burning it. *Holmes's case, Cro. Car.* 376; 1 *Hale, P. C.* 568; 2 *East, P. C.* 1023. So a copyholder, although he has surrendered the house by way of mortgage. *Spalding's case*, 1 *East, P. C.* 1025; 1 *Leach*, 218. So a person who is in possession, under an agreement for a lease of three years. The judges in that case said, that the principle upon which *Holmes's case* (*supra*) was decided, was right, and it was the protection of the person in the actual and immediate possession of the house. *Breeme's case*, 1 *Leach*, 220; 2 *East, P. C.* 1026. See also *Pedley's case*, 1 *Leach*, 242.

Upon the same principle a landlord may be guilty of felony at common law, by burning the house of his tenant. *Foster*, 115; 4 *Bl. Com.* 221. So a woman entitled to dower out of a house in mortgage, the house having been let by her, and the tenant in possession, no dower having been assigned, was held to be guilty of felony in burning the house. *Harris's case, Foster*, 113; 2 *East, P. C.* 1023. So a pauper put into a house, rented from year to year by the overseers, and suffered to live there without paying rent, has no interest, but is merely a servant, and is guilty of felony if he sets fire to the house. The overseers have possession of the house by means of his occupation. *Gowan's case*, 1 *Leach*, 246 (*n.*); 2 *East, P. C.* 1027; *Rickman's case*, 2 *East, P. C.* 1034.

Proof of malice and wilfulness.] It must be proved that the act of burning was both wilful and malicious, otherwise it is only a trespass, and not felony. 1 *Hale, C. P.* 569. Therefore if A. shoot unlawfully at the poultry or cattle of B., whereby he sets the house of another on fire, it is not felony; for though the act he was doing was unlawful, he had no intention to burn the house. *Id.* In this case, observes Mr. East, it should seem to be understood, that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences. 2 *East, P. C.* 1019. If A. has a malicious intent to burn the house of B., and in setting fire to it, burns the house of B. and C., or the house of B. escapes by accident, and that of C. only

is burnt, though A. did not intend to burn the house of C., yet in law this is a malicious and wilful burning of the house of C., and A. may be indicted accordingly. 1 *Hale, P. C.* 569; 2 *East, P. C.* 1019. So if A. command B. to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessary to the burning of the latter house. *Plowd.* 475; 2 *East, P. C.* 1019. So where the primary intention of the offender is only to burn his own house (which is no felony), yet if in fact other houses are thereby burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and the consequence immediately and necessarily flowing from the original act done, it is felony. 2 *East, P. C.* 1031. On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to be given by Maule, J., with a view of showing that the fire was not accidental, that on a previous occasion the prisoner was seen near the rick with a gun in his hand, and that the rick was then also on fire. *Dossett's case*, 2 *C. & K.* 306.

By statute.] The various offences of burning houses and other property are now for the most part provided against by various statutes; the evidence upon indictments under which varies in several respects from the evidence under an indictment at common law.

Setting fire to a dwelling-house, any person being therein.] By the 7 Wm. 4 and 1 Vict. c. 89 (E. & I.,), repealing the 7 & 8 Geo. 4, c. 30 (E.), and the 9 Geo. 4, c. 56 (I.,), it is enacted (s. 2), "that whoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof, shall suffer death."

This sentence may be recorded under the 4 Geo. 4, c. 48, s. 1, *ante*, p. 235.

Under the 7 Wm. 4 and 1 Vict. c. 89, s. 2, the prosecutor must prove: 1st. The wilfully setting fire (see *post*, p. 266). 2nd. To a dwelling-house, which word seems to be used in the restricted sense given to it by the 7 & 8 Geo. 4, c. 89, s. 13 (see *post, tit. Burglary*), and not to include all such buildings as would come within the common law definition of a dwelling-house, the object of the clause apparently being to award a heavier punishment where life is endangered. 3rd. That the party named in the indictment, was in the dwelling-house when it was set on fire.

A stable, which adjoined a dwelling-house, was set on fire; the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. Alderson, B., in summing up the case to the jury, directed them to say by their verdict (should they find the prisoner guilty), whether the house took fire before the family was in the yard or after. If they were of opinion that it was after the family were in the yard, his lordship said, that he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. But his lordship added, that the point being a new one, and of very great importance, he should not take upon himself to decide there, but should reserve the point for the decision of the judges. The prisoner was acquitted of the entire charge.

Warren's case, 1 *Cox, C. C.* 68. A similar decision was come to by Patteson, J., in *Fletcher's case*, 2 *C. & K*, 215.

Setting fire to houses, &c.] By the 7 Wm. 4 and 1 Vict. c. 89, s. 3 (re-enacting the 7 & 8 Geo. 4, c. 30, s. 2, with some slight variations, but modifying the punishment), "whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland; or shall unlawfully and maliciously set fire to any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hopoast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 12, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confiment for any portion or portions of such imprisonment, or imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet." And by the 7 & 8 Vict. c. 62 (which by the fourth section is to be deemed a part of the 7 Wm. 4 and 1 Vict. c. 89), s. 1, "whoever shall unlawfully and maliciously set fire to any hovel, shed, or fold, or to any farm-building, or any building or erection used in farming land, whether the same, or any of them respectively, shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 2, "whoever shall unlawfully and maliciously set fire to any hay, straw, wood, or other vegetable produce, being in any farm-house or farm-building, or to any implement of husbandry being in any farm-house or farm-building, with intent thereby to set fire to such farm-house or farm-building, and to injure or defraud any person, shall be liable to the pains and penalties of unlawfully and maliciously setting fire to the said farm-house or farm-building, with intent thereby to injure or defraud such person."

By s. 3, "every male person under the age of eighteen years, who shall be convicted of any offence under this act, shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner and as often, not exceeding thrice, as the court shall direct."

Proof of the setting fire, &c.] The act of "setting fire" to the

property must be proved. The words "set fire" were used in the stat. 9 Geo. 1, c. 22, and Mr. East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 *East, P. C.* 1020. And he afterwards remarks, that the actual burning at common law, and the "setting fire," under the statute, in effect mean the same thing. *Id.* 1038; *ante*, p. 263. The prisoner was indicted (under the 9 Geo. 1) for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held, that this was not a *setting fire* to the *mill* within the statute. *Taylor's case*, 2 *East, P. C.* 1020; 1 *Leach*, 49. But see now, 9 & 10 Vict. c. 25, s. 7, *post* p. 273.

Upon an indictment under sect. 3 of the 7 W. 4, and 1 Vict. c. 89, and the 7 & 8 Vict. c. 62, the prosecutor must prove: 1st, The act of setting fire; 2nd, To the house or other buildings specified; and 3d, The intent to injure or defraud the party mentioned in the indictment.

On a charge of arson, it appeared that a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed. Cresswell, J., said: "*Parker's case* (see *infra*) is the nearest to the present, but I think it is distinguishable. . . . . . I have conferred with my brother Patteson, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn, and entirely consume without blazing at all." *Maria Russell's case*, *Carr. & M.* 541.

Where the prisoner was indicted under the 7 Wm. 4 and 1 Vict. c. 89, s. 3, and it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way, that it had been at a red heat, though not in a blaze; Parke, B., held, that the offence was complete. *Parker's case*, 9 *C. & P.* 45.

To constitute a setting on fire, it is not necessary that any flame should be visible. *Stallion's case*, 1 *Moo. C. C.* 398, *post*, p. 270. This decision was come to upon the words "set fire" in the 7 & 8 Geo. 4, c. 30, s. 2, which are repeated in the recent statute.

The difficulties which arise in the proof of this offence, are thus noticed by a writer on the criminal law of Scotland: "There is perhaps no crime in which evidence is so difficult as in this, both on account of the secrecy and privacy with which it is usually committed, and the devouring nature of the element raised, which destroys all the usual traces and *indicia* by which in other instances guilt is detected,"—"nevertheless it is not to be imagined that, on account of this difficulty, the prosecutor is to be considered as relieved from any part of the obligation to make out his case; but only that, in default of direct testimony, which is very seldom to be obtained, a conviction may be legally and safely obtained on circumstantial evidence, if it be only sufficiently weighty. To require direct evidence of the wilful completion of the crime, would be in most, and generally the worst cases, to secure absolute impunity to the criminal law. Unlike other crimes, the proof of the *corpus delicti* in wilful fire-raising is generally mixed up with that which goes to fix guilt upon the prisoner; nor indeed in cases where direct evidence

cannot be obtained, can it well be otherwise, as the first effect of the flames is to consume the combustibles which raised them. The *indicia*, which go to substantiate at once the *corpus delicti* and the guilt of the prisoner, are chiefly that the fire broke out suddenly in an uninhabited house, or in different parts of the same building; that combustibles have been found strewed about or dropped at intervals, or placed in convenient situations to excite combustion; as under beds, under thatch, under a stack, &c.: that the prisoner had a cause of ill-will against the sufferer, or had been heard to threaten him, or had been seen purchasing combustibles, or carrying them in the direction of the premises, or lounging about them at suspicious hours. To this is to be added, where the fire was raised to defraud insurers, the important fact of the premises or its furniture having been insured at a higher value, or in different offices at the same time, and of a claim having been made or attempted to be made at both offices." *Alison's Principles of the Cr. Law of Scotland*, 444.

Proof of the property set fire to.] The prosecutor must prove that the property set fire to comes within the meaning of the statute, and the description given in the indictment.

Under the 7 Wm. 4 and 1 Vict. c. 89, s. 3, it is not necessary to prove that a dissenting chapel is registered and recorded, the words "duly registered and recorded," which were contained in the 7 & 8 Geo. 4, c. 30, s. 2, being omitted in that enactment.

The word *house* includes, as it seems, all such buildings as would come within that description, upon an indictment for arson at common law. *Vide ante*, p. 264. That includes such buildings as burglary may be committed in at common law; but whether the word would now be held to include all such buildings as burglary may be committed in under the 7 & 8 Geo. 4, c. 29, s. 13, seems to be doubtful. See *Greenwood's Statutes*, 232 (*n*). A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house*, *outhouse*, or *barn*, within the 9 Geo. 1, c. 22. It was said, that it was not a house in respect of which burglary or arson could be committed; that it was a house intended for residence, but not inhabited, and therefore not a dwelling-house, though intended to be one. That it was not an outhouse, because not parcel of a dwelling-house; and that it was not a *barn*, within the meaning of that word as used in the statute. *Elsmore* v. *Inhab. hundred of St. Briavells*, 8 *B. & C.* 461. Upon the construction of the same statute (9 Geo. 1, c. 22), it has been held that a common gaol comes within the meaning of the word *house*. The entrance to the prison was through the dwelling-house of the gaoler, (separated from the prison by a wall), and the prisoners were sometimes allowed to lie in it. All the judges held, that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One of the counts laid it as the house of the corporation; another, of the gaoler; and a third, of the person whom the gaoler suffered to live in the house. *Donnevan's case*, 2 *East*, *P. C.* 1020; 2 *W. Bl.* 682; 1 *Leach*, 69. But where a constable hired a cellar (as a lock-up house) under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described in an indictment for arson, either as the dwelling-house of the constable, or as an outhouse of the cottage. *Anon. cor. Hullock, B.*, 1 *Lewin, C. C.* 8.

A shed or cabin, though built of stone, roofed, and with low fire-place and window, does not in a case of arson constitute a house within the 7 Wm. 4 and 1 Vict. c. 89, s. 3, where the building was erected not for habitation, but for workmen to take their meals and dry their clothes in, and has not been slept in with permission of the owner. *England's case*, 1 *Cox, C. C.* 79; *S. C.*, 1 *C. & K.* 533.

A *cotton* mill was held to be within the meaning of the word mill in the 9 Geo. 1, c. 22. *Anon.* 2 *Stark. Cr. Pl.* 442 (*n*).

Upon the meaning of the word "outhouse," in the 9 Geo. 1, the following case was decided: It appeared that the prisoner (who was indicted for setting fire to an outhouse) had set fire to, and burnt part of a building of the prosecutor, situated in the yard at the back of his dwelling-house. The building was four or five feet distant from the house, but not joined to it. The yard was inclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public-house, and was also a flax-dresser. The buildings in question consisted of a stable and chamber over over it, used as a shop for the keeping and dressing of flax. It was objected, that this was part of the dwelling-house, and not an outhouse; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purposes, this might be part of the dwelling-house, yet that in fact it was an *outhouse*. *North's case*, 2 *East, P. C.* 1022. The following case was decided upon the words of the same statute: The prisoner was indicted in some counts for setting fire to *an outhouse*, in others to a house. The premises burned consisted of a school-room, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented of the parish by the prosecutor at a yearly rent. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner, that the building was neither a house nor an outhouse within the 9 Geo. 1, c. 22; but the judges were of opinion that it was correctly described either as an outhouse, or part of a dwelling-house within the meaning of the statute. *Winter's case*, *Russ. & Ry. C. C.* 295; 2 *Russ. by Grea.* 558. The following case, upon the construction of the same word, arose on an indictment under the 7 & 8 Geo. 4: The place in question stood in an inclosed field, a furlong from the dwelling-house, and not in sight. It had been originally divided into stalls, capable of holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away, and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was sixteen feet wide, so that a waggon might be drawn through it, under cover. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the inclosed and the uninclosed part, and the inhabitants and owners usually called it the cow-stalls. Park, J., did not consider this an outhouse within the statute, but reserved the point for the opinion of the judges. Six of the judges were of opinion that this was an outhouse within the statute; but seven of their lordships being of a

contrary opinion, a pardon was recommended. *Ellison's case*, 1 *Moody, C. C.* 336. See also *Hilles* v. *Inhab. of Shrewsbury*, 3 *East*, 457; *Woodward's case*, 1 *Moody, C. C.* 325.

The prisoner was tried before Littledale, J., upon an indictment, one count of which charged him with setting fire to an outhouse of W. D. The prosecutor was a labourer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings which did not adjoin the dwelling-house or barn; the first of which from the dwelling-house was a pig-sty, then another pig-sty, then a turkey-house, adjoining to which was the building in question. The dwelling-house and barn formed one side of the farm-yard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts nearly seven feet high, three in the front and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts, one side of the building adjoined the turkey-house which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field and was a rail fence, the rails being six inches wide; these came four or five feet from the ground within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said he should consider the building an outhouse. About half-past two o'clock in the afternoon smoke was seen to issue from the bottom of the roof, in the corner between the field above mentioned and the road; there was a good deal of smoke in the straw; some handfuls of straw were pulled out; there were sparks in the straw when upon the ground, but no sparks were seen in the straw upon the roof; no flame was seen; a ball of linen was pulled out of the roof with the straw; smoke and sparks came from the ball; the ball was trod out; the ball was burnt right through one side; three or four pails of water were brought, and the fire on the roof was extinguished by throwing some of the water upon it. On the following day two half matches were found in the straw on the ground, which was pulled from the roof; but there was no appearance of burning in those. On the same day several handfuls of straw were taken out of the roof, and there was burnt straw in some of these handfuls; and on the same day, on examining the straw lying on the ground down by the building, there were some burnt ashes, and the ends of some of the straw were burnt, and the ends of some of them dropped off like a powder, and the ends of some of the straw had been reduced to ashes; no part of the wood, either in the pieces on which the straw was laid, or in the posts of the building, was burnt. The prisoner was convicted, and sentence of death passed upon him, but execution was respited to take the opinion of

the judges. Three questions were submitted to them: 1st. Whether the building was an outhouse within the meaning of the 7 & 8 Geo. 4. c. 30, s. 2. 2nd. Whether in case the building were an outhouse, the straw (as above described) was a part of the building. 3rd. Whether this was a setting on fire. All the judges present (except Tindal, C. J.), thought the erection an outhouse, and that the conviction was right. *Stallion's case*, 1 *Moody, C. C.* 398.

The prisoner was convicted before Mr. Justice Patteson at the Bedfordshire spring assizes, 1844, for feloniously setting fire to an *outhouse* of Thomas Bourn. The building set fire to was a pig-sty, that shut at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: first, the prosecutor's house fronting the public road, with a back door opening into the yard; then a paled fence about two feet; then a cottage; then a barn attached to it: the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of them had any door or opening into the yard. Next to the cottage and barn was a stable; then a barn; then the pig-sty, all in the possession of the prosecutor, and opening into the yard. Next to the pig-sty was a paled fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields. On the part of the prisoner it was contended, that this pig-sty was not an outhouse, within the statute 7 Wm. 4 and 1 Vict. c. 89, s. 3. The above cases of *Ellison*, *Haughton*, and *Stallion* were referred to; as also the cases of *Parrott*, 6 *C. & P.* 402; *Woodward*, 1 *Moody, C. C.* 323; and *Newill, ibid.* 488. The learned judge reserved the point for the opinion of the judges; and the case was considered at a meeting of all the judges, except Coleridge and Maule, JJ., in Easter term, 1844, when their lordships were unanimously of opinion that the conviction was right. *Amos Jones's case*, 2 *Moody, C. C.* 308.

An indictment for burning a *stable* is not supported by proof of burning a shed, which had been built for and used as a stable originally, but had latterly been used merely as a lumber shed. *Colley's case*, 2 *Moo. & R.* 475. But *semble*, a building built originally for a stable does not cease to be a stable, though horses have not been kept in it for three years, if nothing has been done in the mean time to show an intention of never employing it for that purpose again. *Reg.* v. *Hammond*, 1 *Cox, C. C.* 60; *S. C.* 1 *C. & K.* 303.

In *Amos's case*, 2 *Den. C. C. R.* 65; *S. C.* 20 *L. J. M. C.* 103, it was held, that a building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called "the workshop," used as a storehouse for seasoned timber, as a place for deposit of tools, and for the working up of timber, may be described as "a shed," under 7 & 8 Vict. c. 62.

The house burned should be described as being in the possession of the person who is in the actual occupation, even though the possession be wrongful. Thus where a labourer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period; it was held by the judges, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the labourer. *Wallis's case*, 1 *Moody, C. C.* 344.

As to the amendment of variances between the proof and the allegation in the indictment, see 11 & 12 Vict. c. 46. s. 4, *ante*, p. 107.

Proof of the intent to injure or defraud.] The prosecutor must prove the intent to injure or defraud the party mentioned in the indictment. Upon the proof of the intent of the prisoner, Tindal, C. J., made the following observations in his charge to the grand jury at Bristol: "Where the statute directs, that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill-will should subsist against the person whose property is destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and its necessary consequence must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest (*vide ante*, p. 263). No man can shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended." 5 *Car. & P.* 266 (*n*). Thus where a man was indicted for setting fire to a mill (43 Geo. 2, c. 58, s, 1, repealed) with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence, that the prisoner was an inoffensive man, and never had any quarrel with the occupier, and that there was no known motive for committing the act, and he was convicted; the judges held the conviction right, for that a party who does an act wilfully, necessarily intends that which must be the consequence of his act. *Farrington's case*, *Russ. & Ry. C. C.* 207; *Philp's case*, 1 *Moody, C. C.* 273.

But on an indictment under the 7 Wm. 4 and 1 Vict. c. 89, s. 2, for the capital offence of setting fire to a dwelling-house, some person being therein (the indictment not charging any intent to injure or defraud any person), the prisoner cannot be convicted of the transportable offence of setting fire to the house, under the third section of that statute, as an allegation of intent to injure or defraud some person is essential to an indictment under that section. *Reg.* v. *Paice*, 1 *C. & K.* 73.

It has been held, that a wife who set fire to her husband's house, was not guilty of felony, within the 7 & 8 Geo. 4, c. 30, s. 2. The indictment described the prisoner as the wife of J. Marsh, and charged her with setting fire to a certain house of the said J. Marsh, with intent to injure him, against the statute. It appeared that the prisoner and her husband had lived separate for about two years, and previous to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death. On a case reserved upon the question, whether it was an offence within the 7 & 8 Geo. 4, c. 30, s. 2, for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned judges thinking, that to constitute the offence, it was essential that there should be an intent to injure or defraud

some third person, not one identified with herself. *Marsh's case*, 1 *Moody*, *C. C.* 182.

Where the intent laid is to defraud insurers, the insurance must be proved. To prove this the policy must be produced; evidence of the books of an insurance company not being admissible, unless notice has been given to produce the policy, or the non-production of the policy is accounted for. *Doran's case*. 1 *Esp.* 127. The policy must be properly stamped. *Gilson's case*, *Russ. & Ry C. C.* 138; 2 *Leach*, 1007; 1 *Taunt.* 95.

A prisoner tried at the assizes for arson, on Wednesday the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday the 15th, and the prisoner's home was ten miles from the assize town. It was held that the notice was served too late. *Ellicombe's case*, 5 *C. & P.* 522; 1 *M. & Rob.* 260. It was also held in the same case, that the intent to defraud an insurance company, being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary. In *Kitson's case*, 1 *Dears. C. C. R.* 187, *S. C.* 22 *L. J. M. C.* 118, the Court of Criminal Appeal came to a similar decision.

Attempting to set fire to buildings, &c.] By the 9 & 10 Vict. c. 25, s. 7, "whoever shall unlawfully and maliciously, by any overt act *attempt* to set fire to any building, vessel, or mine, or to any stack or steer, or to any vegetable produce of such kind and with such intent, that if the offence were complete, the offender would be guilty of felony, and liable to be transported beyond the seas for the term of his natural life, shall, although such building, vessel, mine, stack, steer, or vegetable produce be not actually set on fire, be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding two years." And see *post*, *tit. Malicious Injuries*.

This section meets those cases in which the "setting fire" has not been sufficient, see *Taylor's case*, *ante*, 267. The section, it will be observed, makes the attempt to set fire to the different things therein mentioned, a felony; with reference to those things not comprised within the section, the attempt to set fire is a misdemeanour only at common law.

Setting fire to coal mines.] By the 7 Wm. 4 and 1 Vic. c. 89, s. 9, "whosoever shall unlawfully and maliciously set fire to any mine of coal, or cannel coal, shall be guilty of felony," and on conviction may be transported for life, or for not less than fifteen years, or imprisoned for not exceeding three years.

Setting fire to stacks, &c.] By the 7 Wm. 4 and 1 Vict. c. 89, s. 10, "whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

A stack of flax, with seed in it, is a stack of "grain," within the

meaning of this section. *Spencer's case* (Nov. 22nd, 1856), 5 *Weekly Rep.* 70.

See also as to setting fire to farm produce, &c., or implements, being in farm buildings, the 7 & 8 Vict. c. 62, ss. 1, 2, 3, *ante*, p. 266.

As to the power of the court to award hard labour and solitary confinement, see *ante*, p. 266.

By the 7 & 8 Geo. 4, c. 30, s. 17 (which portion of the section is not repealed by the 1 Vict. c. 89), if any person shall unlawfully and maliciously set fire to any crop of corn, grain or pulse, whether standing or cut down, or to any part of a wood, coppice or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

The 9 Geo. 4, c. 56, (I.), s. 18, is exactly similar, with the exception of the omission of the words "or to any heath, gorze, furze, or fern."

The evidence upon an indictment under the tenth section of the 7 Wm. 4 and 1 Vict. c. 89, will, in all material respects, resemble that upon an indictment for setting fire to a house, &c., under section 3, *ante*, p. 266.

Where a man was indicted under the 9 Geo. 1, c. 22, which made it felony to set fire to any cock, mow, or stack of corn, and was charged with being accesary to setting fire to "an unthrashed parcel of wheat," this was held not to be an offence within the statute. *Judd's case*, 1 *Leach*, 484; 2 *East, P. C.* 1018; 2 *T. R.* 255.

The prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to "a stack of straw." It appeared in evidence, that the stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of *haulm*, that is, the aftermath or stubble of rye or wheat, about eighteen inches long; according to one witness the straw and *haulm* were mixed. Amongst other objections to the indictment it was urged, that this was not a stack of *straw* within the statute, and upon a case reserved for the opinion of the judges, they held all the objections good. The prisoner was afterwards indicted for setting fire to "a stack of straw called *haulm*;" but Vaughan, B., intimated his opinion, that it was unsafe to convict on such a count. *Reader's case*, 4 *C. & P.* 245; 1 *Moody, C. C.* 239. See also *Brown's case*, 4 *C. & P.* 553 (*n*); *Tottenham's case*, 7 *C. & P.* 237; 1 *Moo. C. C.* 461.

The 7 Wm. 4 & 1 Vict. c. 89, s. 10, it will be observed, uses the words haulm and stubble as well as straw.

Where the prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to "one stack of barley, of the value of 100*l.*, of R. P. Williams," it was objected that the word "barley" was not mentioned in the statute; but Patteson, J., thought that charging the offence as setting fire to a stack of *barley* was sufficient. *Swatkin's case*, 4 *C. & P.* 548. So an indictment charging the prisoner with setting fire "to a certain stack of *beans*" is good, for the judges are bound to consider *beans* as a species of pulse. *Woodward's case*, 1 *Moody, C. C.* 323. The prisoner was indicted under the

same statute for setting fire to a stack of wood. It appeared that between the house of the prosecutor and the next house there was an archway, over which a sort of loft was made by means of a temporary floor, and that in this place there was an armful of straw, and a score of faggots piled on one another. The prisoner set fire to the straw, which was burnt, as well as some of the faggots. Park, J., was clearly of opinion, that this was not a stack of wood within the meaning of the act of parliament. *Aris's case*, 6 *C. & P.* 348. Where A. and B. were charged with setting fire to a wood, and it appeared that they set fire to a summer-house which was in the wood, and that from the summer-house the fire was communicated to the wood; it was held, that they might be properly convicted on this indictment under the 7 & 8 Geo. 4, c. 30, s. 17. *Price's case*, 9 *C. & P.* 729.

Setting fire to a single detached tree is not arson within the 7 & 8 Geo. 4, c. 30, s. 17; *Davy's case*, 1 *Cox, C. C.* 60.

Where a count in an indictment under the 7 & 8 Geo. 4, c. 30, s. 17, charged the prisoner with setting fire to a certain stack of straw, but without alleging any intent to injure, the judges present, on a case reserved, were unanimously of opinion that, as that clause had no words of intent, the count was good. *R.* v. *Newill*, 1 *Moo. C. C.* 458. It will be observed, that the 7 Wm. & 1 Vict. c. 89, s. 10, does not contain any intent to injure.

Setting fire to ships with intent to murder.] By the 7 Wm. 4 & 1 Vict. c. 89, s. 4, "whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall suffer death."

The sentence may be recorded, *ante*, p. 235.

Under this section the prosecutor must prove, 1st. The setting fire, or other act of the prisoner, by which the ship was cast away or destroyed. 2nd. The intent to murder, from circumstances from which it may be inferred, or otherwise, that the life of some person was endangered by the act done.

Setting fire to ships with intent to destroy the same.] By the 7 Wm. 4 and 1 Vict. c. 89, s. 6 (re-enacting with some verbal alterations the 7 & 8 Geo. 4, c. 30, s. 9, but modifying the punishment), "whosoever shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten, or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

As to the power to award hard labour and solitary confinement, see *ante*, p. 266.

The evidence upon an indictment under the 7 Wm. 4 and 1 Vict.

c. 89, s. 6, for setting fire to a ship will, in all material respects, be the same as that before detailed upon an indictment for setting fire to a house, *ante*, p. 265.

Where a pleasure boat eighteen feet long was set fire to, Patteson, J., inclined to think it was a vessel within the meaning of the 7 & 8 Geo. 4, c. 30, s. 9; but the prisoner being acquitted on the merits, no decided opinion was given. *Bowyer's case*, 4 *C. & P.* 559. Upon an indictment for setting fire to a barge, Alderson, J., said, that if the prisoner was convicted, he would take the opinion of the judges as to whether a barge was within the statute. The prisoner was acquitted. *Smith's case*, 4 *C. & P.* 569.

If the intent be laid to prejudice the underwriters, the policy must be produced (*ante*, p. 273); and it must be proved that the ship sailed on her voyage.

It has been held that the part-owner of a ship may be convicted of setting fire to it with intent to injure the other part-owners, although he has insured the whole ship and promised that the other part-owners shall have the benefit of the insurance. *Philp's case*, 1 *Moody, C. C.* 263; *R.* v. *Newill*, 1 *Moody, C. C.* 458. A person may be tried under the 7 Wm. 4 and 1 Vict. c. 89, ss. 6 & 11, as an accessary before the fact, to the offence of setting fire to a vessel of which he was at the time part-owner. *Wallace's case*, *Carr. & M.* 200. The underwriters on a policy on goods fraudulently made are within the statute, though no goods be put on board. *S. C.* 2 *Moo. C. C.* 200. See *ante*, p. 55.

Setting fire to ships of war, &c.] By the 12 Geo. 3, c. 24, s. 1, "if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully or maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dockyards, or building or repairing by contract in any private yards for the use of his Majesty, or any of his Majesty's arsenals, magazines, dockyards, ropeyards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships, or vessels, or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places, where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."

By s. 2, "any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner and form as if such offence had been committed within the said shire or county, or in such island, country, or place where such offence shall have been actually committed, as his Majesty, his heirs or successors, may deem most expedient for bringing such offender to justice: any law, usage, or custom notwithstanding." This offence is still capital, 7 & 8 Geo. 4, c. 28, ss. 6 & 7.

By the articles of the navy (22 Geo. 3, c. 38, art. 25) every person who shall unlawfully burn or set fire to any magazine or store of

powder, or ship's boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial.

Setting fire to ships, &c., in the port of London.] The 39 Geo. 3, c. 69, a public local act for rendering more commodious, and for better regulating the port of London, enacts (by s. 104), "that if any person or persons whomsoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basins, cuts, or other works to be made by virtue of this act, every person so offending in any of the said cases, shall be adjudged guilty of felony without benefit of clergy."

Negligent burning.] By the 6 Anne, c. 31, and 14 Geo. 3, c. 78, s. 84, "if any menial or other servant, through negligence or carelessness, shall fire, or cause to be fired any dwelling-house or otherwise, and be convicted thereof, by oath of one witness before two justices, he shall forfeit 100*l.* to the churchwardens, to be distributed amongst the sufferers by such fire; and if he should not pay the same immediately on demand of the churchwardens, he shall be committed by the justices to some workhouse, or common gaol, or house of correction, for eighteen months, there to be kept to hard labour."

For provisions of the statute 9 & 10 Vict. c. 25, "an act for preventing malicious injuries to persons and property by fire, or by explosive or destructive substances," see *post, tit. Malicious Injuries.*

it amounts to a battery, which includes an assault. A battery seems to be, when any injury whatsoever, be it never so small, is actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him; *Pursell* v. *Home*, 8 *A. & E.* 602; or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *East, P. C.* 406; 1 *Hawk. c.* 62, *s.* 2; *Rawlings* v. *Till*, 3 *M. & W.* 28. *B. N. P.* 15.

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault: therefore on an indictment for an assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 *Hawk. b.* 1, *c.* 62, *s.* 1. The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c. against the carriage of another person, and thereby causing bodily injury to the persons travelling in it. And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a lighted squib into a market-place, which being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye; it was adjudged that this was actionable as an assault and battery, *Scott* v. *Shepherd*, 2 *Bl. Rep.* 892; 3 *Wils.* 403, by three judges; *Blackstone, J., contra.* And the same has been holden where a person pushed a drunken man against another, and thereby hurt him. *Short* v. *Lovejoy, cor. Lee, C. J.*, 1752, *B. N. P.* 16. But if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable. *Id. ibid.* 1 *Russ. by Grea.* 751-752.

What does not amount to an assault.] Although it was formerly doubted, it is now clear that no words, whatever nature they may be of, will constitute an assault. *Hawk. P. C. b.* 1, *c.* 62, *s.* 1; 1 *Bac. Ab. Assault and Battery* (*A*); 1 *Russ. by Grea.* 750. But words may qualify what would otherwise be an assault, by showing that the party intends no present corporal injury, as where a person meeting another, laid his hand upon his sword, saying, "If it were not assize time, I would not take such language from you;" for it shows that he had not a design to do the party any corporal hurt. *Tuberville* v. *Savage*, 1 *Mod.* 3; 2 *Keb.* 545.

What does not amount to an assault—accident.] Where an injury is purely accidental, and the party wholly without fault, it will not amount to a battery. *Weaver* v. *Ward*, *Hob.* 134; 2 *Roll. Ab.* 548. Thus where the defendant was indicted for throwing down skins in a yard, being a public place, by which a man's eye was beaten out, it appearing that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendant was acquitted. *Gill's case*, 1 *Str.* 190. But if in the course of an unlawful act a blow is struck, as where two persons are engaged in fighting, and one of them accidentally and unintentionally strikes a third person, this is not such an accident as will prevent the blow from being a battery. *James* v. *Campbell*, 5 *C. & P.* 372.

There is a distinction in cases of accident, with regard to the liability of the party, in civil and in criminal proceedings. Thus it is said by

Hawkins, that it seems that a man shall not forfeit a recognizance of the peace by a hurt done to another merely through negligence or mischance, as where one soldier hurts another by discharging a gun in exercise without sufficient caution; for notwithstanding such person must in a civil action give the other satisfaction for the damage occasioned by his want of care, yet he seems not to have offended against the purport of such a recognizance, unless he be guilty of some wilful breach of the peace. *Hawk. P. C. b.* 1, *c.* 60, *s.* 27. It is said that it may be deemed a general rule in criminal cases, that the same facts which make killing homicide by misadventure (*vide post*), will be a good defence upon an indictment for a battery. *Archb. Cr. L.* 443, 10*th ed.*

What shall not amount to an assault—amicable contest.] An injury received in playing at any lawful sport, as cudgels, by consent, will not amount to a battery in law, for the intent of the parties is not unlawful, but rather commendable, and tending mutually to promote activity and courage; yet it seems it would be otherwise, if the fighting were with naked swords, because no consent can make so dangerous a diversion lawful. *Hawk. P. C. b.* 1, *c.* 60, *s.* 26; *Com. Dig. Pleader* (3 *M.* 18); *Bul. N. P.* 15. In an action for assault and battery, where it was insisted as a defence that the plaintiff and defendant fought by consent, Parker, C. B., said, that fighting being unlawful, the consent of the plaintiff would be no bar to the action; and he cited a case where Reynolds, C. B., in an action to recover five guineas on a boxing-match, held the consideration illegal. *Boulter* v. *Clarke*, *B. N. P.* 16. See also *Lewis's case*, 1 *C. & K.* 419.

What does not amount to an assault—lawful chastisement.] If a parent in a reasonable manner chastise his child, or a master his servant being actually his servant at the time, or a schoolmaster his scholar, or a gaoler his prisoner, or if one confine a friend who is mad, and bind and beat him, in such circumstances it is no assault. *Hawk. P. C. b.* 1, *c.* 30, *s.* 23; *Com. Dig. Pleader* (3 *M.* 13.) A defendant may justify even a *mayhem*, if done by him as an officer of the army for disobedience of orders, and he may give in evidence the sentence of a council of war, upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant. *Lane* v. *Degberg*, *B. N. P.* 19. In all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. 1 *East, P. C.* 406; and see *post, tit. Murder.*

What does not amount to an assault—self-defence.] A blow or other violence necessary for the defence of a man's person against the violence of another will not constitute a battery. Thus if A. lift up his stick and offer to strike B., it is a sufficient assault to justify B. in striking A.; for he need not stay till A. has actually struck him. *B. N. P.* 18. But every assault will not justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; an assault may indeed be of such a nature as to justify a *mayhem*: but where it appeared that A. had lifted the form upon which B. sat, whereby the latter fell, it was held no justification for B.'s biting off A.'s finger. *B. N. P.* 18. In cases of assault, as in other cases of trespass, the party ought not in the first instance to beat the assailant, unless the attack is made with such violence as to render the battery necessary. *Weaver* v. *Bush*, 8 *T. R.* 78; 1 *Russ. by Grea.* 754.

Where a man strikes at another within a distance capable of the latter being struck, he is justified in using such a degree of force as will prevent a repetition. *Per Parke, B., Anon.* 2 *Lewin, C. C.* 48. But a blow struck after all danger is past, is an assault. *Driscoll's case, Car. & M.* 214, *per Coleridge, J.* If the violence used be more than is necessary to repel the assault, the party may be convicted of an assault. *Mabel's case*, 9 *C. & P.* 474, *post*, 284.

The rule on this point is well laid down by a writer on Scotch law: "Though fully justified in retaliating, the party must not carry his resentment such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet, or hammer, against a fist or cane, or in general pushing his advantage, in point of strength or weapon, to the uttermost. In such cases the defence degenerates into aggression, and the original assailant is entitled to demand punishment for the *new assault* committed on him, after his original attack had been duly chastised." *Alison's Princ. Cr. Law of Scot.* 177; 1 *Hume*, 335.

What does not amount to an assault—interference to prevent breach of the peace, &c.] A man may justify an assault and battery, in preventing the commission of a felony or breach of the peace, or in the suppression of a riot, &c.; as if he force a sword from one who offers to kill another therewith, or gently lay his hands upon another, and thereby stay him from inciting a dog against a third person. *Hawk. P. C. b.* 1, *c.* 60, *s.* 23; 1 *Russ. by Grea.* 755; *Com. Dig. Pleader* (3 *M.* 16.) See *Timothy* v. *Simpson*, 1 *M. & R.* 757; 5 *Tyrwh.* 244. Although where there is an actual assault, any one may interfere between the parties to prevent a further breach of the peace, and may justify an assault in so doing, yet a further privilege is given to persons standing in a particular relation. Thus in the case of husband and wife, where the latter is charged with a battery, it is a justification for her that A. B., the person struck, was going to wound her husband, and that she committed the assault to defend him, and prevent A. B. from beating him. *B. N. P.* 48; 1 *Lord Raym.* 62. So the husband may justify a battery in defence of his wife. In like manner, a child may justify any assault in defence of his parent. *B. N. P.* 18; *Hawk. P. C. b.* 1, *c.* 60, *s.* 23. Though a servant may justify an assault in defence of his master, yet it has been said that a man cannot justify an assault in defence of his servant, because he may have an action *per quod servitium amisit*; but the servant can have no action for an assault upon his master. *Leward* v. *Baseley*, 1 *Lord Raym.* 62; 1 *Salk.* 407; *B. N. P.* 18. The reason appears to be an insufficient one, since it would be equally applicable to the case of a husband committing an assault in defence of his wife, for an injury to whom an action *per quod consortium amisit* will lie. *Hawkins*, though he states that there are opinions to the contrary, lays down the rule as including the case of a master committing an assault in defence of his servant. *Hawk. P. C. b.* 1, *c.* 60, *ss.* 23, 24. And this also was the opinion of Lord Mansfield, "I cannot say," he observes, "that a master interposing when his servant is assaulted, is not justifiable under the circumstances, as well as a servant interposing for his master. It rests on the relation between master and servant." *Tickell* v. *Read*, *Lofft*, 215; 1 *Russ. by Grea.* 756. A servant cannot, as it seems, justify an assault in defence of his master's son. *Hawk. P. C. b.* 1. *c.* 60, *s.* 24; 1 *Russ. by Grea.* 756. Nor a tenant in de-

fence of his landlord. *Leward* v. *Baseley*, 1 *Lord Raym.* 62. A person is justified in giving in charge, and a constable in arresting without warrant, a party who has been guilty of a breach of the peace, if there are reasonable grounds for apprehending its continuance or immediate renewal, but not otherwise. *Baynes* v. *Brewster*, 11 *Law Jour. M. C.* 5.

What does not amount to an assault—defence of possession.] A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. *Hawk. P. C. b.* 1, *c.* 60, *s.* 23; *Alderson* v. *Waistell*, 1 *C. & K.* 358. In these cases, unless the trespass is accompanied with violence, the owner of the land will not be justified in assaulting the trespasser in the first instance; but should request him to depart or desist, and if he refuses, should gently lay hands on him for the purpose of removing him, and if he resist with force, then force may be used in return by the owner, sufficient to effect his expulsion. *Weaver* v. *Bush*, 8 *T. R.* 78; 2 *Roll. Ab.* 548; 1 *East, P. C.* 406; *B. N. P.* 19. But it is otherwise, if the trespasser enter the close with violence, in which case the owner may, without a previous request to depart, use violence in return in the first instance. *Green* v. *Goddard*, *Salk.* 641; *Tullay* v. *Reed*, 1 *C. & P.* 6; *B. N. P.* 19. But by this must be understood a force proportioned to the violence of the trespasser, and only for the purpose of subduing his violence. See 1 *Russ. by Grea.* 758 (*n*). "A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into *the dwelling* of another. But a man is not authorised to fire a pistol on every invasion or intrusion into his house. He ought, if he has a reasonable opportunity, to endeavour to remove the trespasser without having recourse to the last extremity." *Meade's case*, 1 *Lewin, C. C.* 185, stated *post*. It seems that in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. *Vide post, titles, Manslaughter and Murder.*

What does not amount to an assault—execution of process by officers, &c.] A peace officer, or sheriff's officer may justify laying hands upon a party to arrest him. 2 *Roll. Ab.* 546. But it is only under particular circumstances that a sheriff's officer, in serving another with process, can lay hands upon him. *Harrison* v. *Hodgson*, 10 *B. & C.* 445. A peace officer, like others, must only use the degree of force necessary for the occasion, and will be answerable for the excess; as where a constable had apprehended a boy fighting, and a by-stander said, "you ought not to handcuff the boy," upon which the constable gave him a blow with a stick, and took him to the watchhouse; in an action by the party struck, against the constable, it appeared that the plaintiff had placed himself before the defendant for the purpose of preventing him from taking the boy to the watchhouse. Burrough, J., said, "There can be no doubt that the constables were right in stopping the fight, and would be justified in apprehending any one who aided or abetted those who fought; but it did not appear that the defendant did either. If they thought that as the defendant was apprehending the boy, the plaintiff placed him-

self before the defendant to hinder him from doing so, that would justify the defendant in detaining the plaintiff at the watchhouse, but not in beating him; but if the plaintiff only said, 'you have no right to handcuff the boy,' the defendant was clearly a wrong doer as to the whole." *Levy* v. *Edwards*, 1 *C. & P.* 40. So, where one of the marshals of the city of London, whose duty it was on the days of public meeting in the Guildhall, to see that a passage was kept for members of the corporation, directed a person in front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying, that he would make him, it was ruled, that in so doing he exceeded his authority; that he should have confined himself to the use of pressure, and that he should have waited a short time, to afford an opportunity for removing the party in a more peaceable way. *Imason* v. *Cope*, 5 *C. & P.* 193. The defendant was indicted for assaulting a policeman in the execution of his duty. It appeared that the policeman having been called into a public-house to put an end to a disturbance which the defendant was making, found him at high words with the landlord. The defendant attempted to go into a room in which a guest was sitting, whereupon the policeman collared him, without being desired to do so, and prevented his going into the room. The defendant then struck the policeman, and several blows passed on both sides. Parke, B., held, that if the jury were satisfied that there was no likelihood of the defendant's committing a breach of the peace on the guest in the room, it was no part of the policeman's duty to prevent the defendant from entering it; but assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, they ought to find him guilty of a common assault. *Mabel's case*, 9 *C. & P.* 474. A coroner; *Garnett* v. *Ferrand*, 6 *B. & C.* 611; and a magistrate upon a preliminary inquiry; *Cox* v. *Coleridge*, 1 *B. & C.* 16; may justify a forcible exclusion of a party from the room, even although he be the attorney of the person accused. Where, however, the inquiry is of a final and judicial nature, all persons have a right to be present. *Daubney* v. *Cooper*, 10 *B. & C.* 237.

Summary conviction bar to an indictment for assault.] The 9 Geo. 4, c. 31, s. 27, enacts, "that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered) the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the general use of the rate of the county, riding, or division, in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justices, together with the costs (if ordered) shall not be paid, either immediately after the conviction, or within such period as the said justices shall, at the time of conviction, appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there

to be imprisoned for any term not exceeding two months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith (on the interpretation of this word see *Robinson's case*, 10 *Law Jour. M. C.* 9) make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." By s. 28, "if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted, shall have paid the whole amount adjudged to be paid, or have suffered the punishment awarded for non-payment; in every such case, he shall be released from all further or other proceedings, civil or criminal, for the said cause."

By s. 29, it is provided, "that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereon, and shall deal with the case in all respects in the same manner as they would have done before the passing of the act: provided also, that nothing therein contained shall authorise any justice of the peace to hear and determine any case of assault or battery, in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein, or accruing therefrom, or as to any bankruptcy, insolvency, or any execution, under the process of any court of justice."

It seems where the assault is with intent to commit a felony, it is optional with the justices whether they will convict the offender of a common assault, or direct him to be indicted. Where the charge was of such an assault, and the magistrates proceeded to convict, on an application for a *certiorari* to quash the conviction, Lord Tenterden said, that the conviction was for a common assault, and that the act gave the justices a discretionary power to judge whether the charge amounted in substance to more than a common assault. Parke, J., observed, that at all events a *certiorari* could hardly be granted; for if the magistrates had no jurisdiction, the conviction was a nullity. *Virgil's case*, 1 *Lewin*, *C. C.* 16 (*n*). And see *Anon* 1 *B. & Ad.* 382.

Power to convict of an assault upon an indictment for felony, repealed.] By the 7 Wm. 4 and 1 Vict. c. 85, s. 11, it was enacted, "that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years."

But this section has been, owing to the difficulties which arose upon its construction, expressly repealed by the 14 & 15 Vict. c. 100, s. 10.

But by sect. 9 of that statute, a person indicted for a felony or misdemeanor may be found guilty of an attempt to commit the same, and is liable as if charged with, and convicted of the attempt only.

ASSAULTS—AGGRAVATED.

Under this head are comprised certain assaults to which, being of an aggravated character, the legislature has attached additional punishment. Various other enactments of the same nature will be found stated in a subsequent part of this work, in connexion with the offence with intent to commit which the assault is charged to have been made.

In prosecuting for the offence of an aggravated assault, the statute points out the particular evidence necessary to be given in addition to the common proof of assault.

Assaults with intent to commit felony, &c.] By the 9 Geo. 4, c. 31, (E.), s. 25, it is enacted, "that where any person shall be charged with and convicted of any of the following offences as misdemeanours, that is to say, of any assault with intent to commit felony, of any assault upon any peace officer, or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages: in any such case, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

Aggravated assaults under 14 & 15 *Vict. c.* 19, *s.* 4.] The 14 & 15 Vict. c. 19, s. 4, enacts that, "whereas it is expedient to make further provision for the punishment of aggravated assaults, be it enacted, that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the

discretion of the court, to be imprisoned, with or without hard labour, for any term not exceeding three years; provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the 10 Geo. 4, c. 34, s. 29.

Indecent assaults, &c.] By the 14 & Vict. c. 100, s. 29, whenever any person convicted (amongst other offences) of any indecent assault, or any assault occasioning actual bodily harm, "it shall be lawful to the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such imprisonment."

Assaults on officers endeavouring to save shipwrecked property, &c.] By the 9 Geo. 4, c. 31, s. 24, it is enacted, "that if any person shall assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorised, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water; every such offender being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol, or house of correction, for such term as the court shall award."

Assaults on officers employed to prevent smuggling.] By the 8 & 9 Vict. c. 87, s. 66, it is enacted, "that if any person shall by force or violence assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, such person being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted as aforesaid."

Aggravated assaults upon women and children.] By the 16 & 17 Vict. c. 30, s. 1, it is enacted, that "when any person shall be charged before two justices of the peace, sitting at a place where the petty sessions are usually held, or before any magistrate of the police courts of the metropolis, sitting at any such police court, or before any stipendiary magistrate elsewhere, with an assault upon any female whatever, or upon any male child, whose age shall not, in the opinion of such justices, or police or stipendiary magistrates, exceed fourteen years, either upon the complaint of the party aggrieved, or otherwise, it shall be lawful for the said justices, or police or stipendiary magistrates, if the assault is of such an aggravated nature that it cannot in their, or his, opinion be sufficiently punished under the provisions of the statute ninth George the Fourth, chapter thirty-one, to proceed to hear and determine, in a summary way, and if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for a period not exceeding six calendar months, or to pay a fine not exceeding

(together with the costs) the sum of twenty pounds, and in default of payment, to be imprisoned as aforesaid, with or without hard labour, for a period not exceeding six calendar months, unless such fine and costs be sooner paid, and if the magistrate or magistrates shall so think fit, shall be bound to keep the peace, and be of good behaviour for any period not exceeding six calendar months from the expiration of such sentence; and such conviction shall be a bar to all future proceedings, civil or criminal, for, or in respect of the same assault; and no person convicted under this act shall be entitled to appeal against such conviction to the general quarter sessions of the peace, anything to the contrary in any statute notwithstanding."

Assault with intent to spoil clothes.] By the 6 Geo. 1, c. 23, s. 11, "if any person or persons shall wilfully and maliciously assault any person or persons in the public streets or highways, with an intent to tear, spoil, cut, burn, or deface, and shall tear, spoil, cut, burn, or deface the garment or clothes of such person or persons, then all and every persons so offending, and being thereof lawfully convicted, shall be, and be adjudged to be, guilty of felony; and every such felon and felons shall be subject and liable to the like pains and penalties as in case of felony."

This statute is now repealed; but it is mentioned here for the purpose of introducing the following case, in which much discussion took place with regard to the proof of intention, a question of great importance in cases of this nature.

The prisoner had frequently accosted Miss A. Porter and her sister, Miss Sarah Porter, using very indecent language. Meeting them in St. James's Street, he came behind Miss Sarah Porter, muttered some gross language, and upon her making an exclamation of alarm, struck her a blow on the head. The Misses Porter then ran towards the door of their own house, and while Miss S. Porter was ringing the bell, the prisoner, who had followed them, stooped down, and struck Miss A. Porter with great violence on the hip. The blow was given with some sharp instrument, which tore and quite cut through her clothes, and gave a very severe wound. Buller, J., told the jury, that in order to constitute an offence within the statute, it was necessary, first, that the assault should be made in the public street or highway; 2ndly, that it should be made wilfully and maliciously; 3rdly, that it should be made with an intent to tear, spoil, cut, &c., the garments or clothes of some person; and 4thly, that the garments or clothes of such person should be actually torn, spoiled, cut, &c. Upon the third point he stated, that if the intent of the prisoner was to cut both the clothes and the person, and in carrying such intent into execution, the clothes alone were cut, it would clearly be within the meaning of the act; or if the intention were to injure the person only, and not to cut the clothes; yet, if in carrying such intention into execution, the assault was made with such an instrument, or under such circumstances, as plainly showed that the execution of the intention to injure must unavoidably tear, cut, spoil, &c. the clothes, they might consider whether a person who intends the end, does not also intend the means by which it is to be attained. The jury found the prisoner guilty; but upon a case reserved, a majority of the judges were of opinion that the conviction was wrong. They thought, that in order to bring a case within the statute, the primary intention ought to be the tearing, spoiling, cutting, &c., of the clothes; whereas in this case, the primary intention of the prisoner

appeared to have been the wounding of the person of the prosecutrix. *Williams's case*, 1 *Leach*, 533; 1 *East*, *P. C.* 424. It may be doubted whether the opinion of Buller, J., in this case was not better founded than that of the judges. It appears to be supported by *Cox's case*, *Russ & Ry*. 362, and *Gillow's case*, 1 *Moody*, *C. C.* 85, stated *post*. The decision of the judges, indeed, in *Williams's case*, proceeded principally on another point.

Assault by workmen.] By the 6 Geo. 4, c. 129 (E.), s. 3, "if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person, hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent, or endeavour to prevent any journeyman, manufacturer, workman, or other person, not being hired or employed, from hiring himself to, or accepting work or employment from, any person or persons; or if any person or persons shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty on account of not belonging to any club or association, or not having contributed, or refused to contribute to any common fund, or to pay any fine or penalty; or on account of not having complied, or refused to comply, with any rules, orders, or regulations, made to obtain an advance or reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on trade or business, to make any alteration in his mode of carrying on or conducting such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every one so offending, or aiding, abetting, or assisting therein, shall be imprisoned only, or imprisoned and kept to hard labour, for any period not exceeding three calendar months."

The Irish statute law corresponding with the 9 Geo. 4, c. 31, ss. 25, 24, and the 6 Geo. 4, c. 129, s. 3, is the 10 Geo. 4, c. 34, ss. 31, 30, 28. The Irish statute moreover enacts, in s. 29, that whoever shall unlawfully and maliciously assault, beat, or wound, any person, so as to endanger the life of, or thereby inflict any grievous bodily harm, upon such person, shall be liable to be transported for seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped.

BANKRUPT; OFFENCES BY.

The offences committed by bankrupts under the Bankruptcy Act, are now comprised in the 12 & 13 Vict. c. 106, ss. 251, 252, and 253.

S. 251 enacts, "That if any person adjudged bankrupt shall not upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally, or left at the usual, or last known place of abode or business of such person, or personal notice, in case such person be then in prison, and notice given in the "London Gazette," of the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, as the case may be, and of the sitting of the court (having no lawful impediment proved to the satisfaction of the court at such time, and allowed by the court, by a memorandum thereof then made on the proceedings), surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and where he disposed of, assigned, or transferred, any of such estate (and all books, papers, and writings, relating thereunto, except such part as shall have been, really and *bonâ fide*, before sold or disposed of in the way of his trade, or laid out in the ordinary expenses of his family); or if any such bankrupt, upon such examination, shall not deliver up to such court all such part of such estate, and all books, papers, and writings, relating thereunto, as shall be in his possession, custody, or power (except all the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate to the value of ten pounds or upwards, or any books of accounts, papers, or writings, relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to transportation for

life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to imprisonment, with or without hard labour, for any term not exceeding seven years."

S. 252 enacts, "That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of the law relating to bankrupts, destroy, alter, mutilate, falsify any of his books, papers, writings, or securities, or make, or be privy to the making of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanour; and, on conviction, be liable to imprisonment for any term not exceeding three years, with or without hard labour."

S. 253 enacts, "That if any bankrupt shall, within three months next preceding the date of the fiat, or filing of the petition for adjudication of bankruptcy, under the false colour and pretence of carrying on business, and dealing in the ordinary course of trade, obtain on credit from any other person any goods, or chattels, with intent to defraud the owner thereof; or if any bankrupt shall, within such time, and with such intent, remove, conceal, or dispose of any goods or chattels so obtained, knowing them to have been so obtained, every such bankrupt shall be deemed guilty of a misdemeanour; and, on conviction, be liable to imprisonment for any term not exceeding two years, with or without hard labour."

There are four different offences, all felonies, created by section 251; 1. the bankrupt not surrendering and submitting to be examined; 2. the not discovering all his real and personal estate, and all his books, papers, and writings relating thereto; 3. the not delivering up to the commissioners all such part of such estate, and all books, &c. as shall be in his possession, &c.; 4. the removing, concealing, or embezzling part of such estate, to the value of 10*l.* and upwards, or any of his books, papers, and writings.

The offences made misdemeanours by sections 252 & 253 are, 1. the bankrupt destroying or falsifying his books, "with intent to defraud his creditors;" see *post*, p. 295; 2. his obtaining goods on credit, or disposing of them, within three months previous to his bankruptcy, with intent to defraud the owner thereof.

To support a prosecution against a bankrupt under this statute, the prosecutor must prove—1. the trading; 2. the petitioning creditor's debt; 3. the act of bankruptcy; 4. the petition for adjudication, and 5. the adjudication; in other words the prisoner must be shown to have been *duly* adjudged a bankrupt. *R.* v. *Jones*, 4 *B. & Ad.* 345, *Land's case*, 25 *L. J. M. C.* 14. If the indictment be for not surrendering as a bankrupt, in addition to this evidence, proof must be given of the service of the notice of surrender upon him; its insertion in the London Gazette; and that he did not surrender. If for not discovering all his real and personal estate, the examination of the bankrupt must be produced and evidence given of the property which the bankrupt is charged to have concealed. So also, if the indictment be for not delivering up such property. If the indictment be for removing, concealing, or embezzling part of the estate, in addition to the above evidence, the value of the property must be found to be at least 10*l.*; and it must be proved to have been done "with intent to defraud" the creditors. Whether these words as used in the present statute govern all the offences previously described in this section as they were held to have

done in the previous statute, 6 Geo. 4, c. 16, s. 112, *Hill's case*, 1 C. & K. 168, seems to be doubtful. The point was raised, but not decided in *Gordon's case*, 25 *L. J. M. C.* 19. Where the act of bankruptcy relied upon was the bankrupt filing a petition in the Insolvent Court, a copy of the petition certified to be correct by the proper officer of the court, and made evidence of the petition under section 239 of the statute was held to be no evidence of the date of the filing of the petition, although there was on the back of the copy of the petition an indorsement purporting to state when the petition was filed. *Land's case*, 25 *L. J. M. C.* 14.

Proof of the trading.] The trading must be proved in the same manner as in a civil action, by the assignees, where strict evidence of their title is required. See *Rosc. Dig. Ev. N. P.* 565, 7th ed., and 12 & 13 Vict. c. 106, s. 65.

Proof of the petitioning creditor's debt.] This also must be proved in the same manner as in the civil action. See *Rosc. Dig., Ev. N. P.* 560, 7th ed., and 12 & 13 *Vict.* c. 106, s. 91.

Proof of the act of bankruptcy.] So also as respects the act of bankruptcy, see *Rosc. Dig. Ev. N. P.* 567, 7th ed. By the 12 & 13, Vict. c. 106, s. 233, "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty one days after the advertisement of the bankruptcy in the 'London Gazette,' or (if he were in any part of Europe at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the gazette containing such advertisement shall be *conclusive evidence in all cases as against such bankrupt*, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged became a bankrupt before the date and suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the gazette to bear date." This enactment has been held to apply to criminal proceedings against the bankrupt, *Per Coleridge J.* in *Hall's case, Newcastle Spring Assizes* 1846, *M. S.*; but not as against other parties sued or prosecuted with him. *Harris's case*, 4 *Cox C. C.* 140; in which case Platt, B., also held that it was a condition precedent to the admissibility of the gazette in evidence at all, and for the prosecutor to give *some* evidence of, that the bankrupt had not taken any steps to annul the fiat.

The petition of adjudication, and adjudication.] These may be proved by copies respectively purporting to be under the seal of the Court of Bankruptcy; the 236 sect. of the 12 & 13 Vict. c. 106, enacting "that any fiat, *petition for adjudication of bankruptcy, adjudication of bankruptcy*, petition for arrangement between a debtor and his creditors, assignment, appointment of assignees, certificate, deposition or other proceeding in order in bankruptcy, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a

copy of any such document, and purporting to be so sealed, shall *at all times and on behalf of all persons*, and whether for the purposes of this act or otherwise, be admitted *in all courts whatever* as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of the court, without any further proof thereof, and no such document or copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided."

The fact of there being erasures and interlineations in these documents will not render them inadmissible in evidence, although no proof be given when they were made; the presumption in such cases being against fraud and misconduct. *Gordon's case*, 25 *L. J. M. C.* 19. When it appeared upon the petition that it was assigned by ballot to Mr. Commissioner Goulburn, but the subsequent proceedings were either before Mr. Commissioner Holroyd or Mr. Commissioner Fonblanque, it was held that this did not render the proceedings invalid. *Id.*

Proof of the notice to the bankrupt.] The statute requires the notice to be in writing, "to be served upon him personally or be left at the usual or last known place of abode or business" of the bankrupt; but in case he be in prison, personal notice must be given.

In *Gordon's case*, 25 *L. J. M. C.* 19, the question was twice argued before the judges of the court of Criminal Appeal, whether in the case of two or more partners being bankrupt, a separate notice should not be left for each of the bankrupts. The judges were divided in opinion, but the majority held that such separate notice was necessary and quashed the conviction on that ground.

Where the notice of surrender required the bankrupt to surrender on two several days, one of which was passed at the time of the service of the notice, it was held to be a good notice, under sections 101 and 251 of the statute. *Gordon's case*, 25 *L. J. M. C.* 19.

Proof of notice in the gazette.] The gazette is proved by its production, without evidence of its having been bought at the gazette printers or elsewhere. *Forsyth's case*, *Russ. & Ry.* 277. A variance between the adjudication and the notice in the gazette in the description of the place of business of the bankrupt, in the one the description being of "West Ham Lane, Middlesex," in the other of "West Ham Lane, Essex," is immaterial. *Gordon's case*, 25 *L. J. M. C.* 19.

Proof of the bankrupt's examination.] The bankrupt's examination may be proved by a copy of the same under the seal of the court (see s. 236 of the statute, *infra*, p. 292). Parol evidence of what the bankrupt said cannot be given. *Walters's case*, 5 *C. & P.* 141.

Proof of the not surrendering, concealment, &c.] With respect to the proof that the bankrupt did not surrender, in *Dealtry's case*, 1 *Den. C. C. R.* 287, the facts were these. The bankrupt was indicted for not surrendering to the district court of bankruptcy at Manchester. The court was presided over by two judges, Mr. J. and Mr. S., and (practically) comprised two courts. The summons was issued and signed by Mr. J., and required the bankrupt to appear before the commissioner acting in prosecution of the fiat at the Manchester district court of bankruptcy. Mr. J. was the commis-

sioner acting in prosecution of this fiat. It was proved that the bankrupt had not appeared pursuant to the said summons at the said court at all, nor before Mr. J. elsewhere; but there was no proof of his having appeared or not before Mr. S. elsewhere. It was held by the judges that the proof of non-appearance was sufficient.

If a bankrupt has once surrendered, it appears that any subsequent omission to attend on the part of the bankrupt is not within the statute. *Per Erle, J., in Kenrick's case*, 1 *Cox, C. C.*, 146.

With respect to a concealment of his property by the bankrupt, in order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where the prisoner was indicted under the 5 Geo. 2, c. 30, for not submitting to be examined, and truly disclosing, &c., and the evidence was, that on the last day of examination he appeared before the commissioners and was sworn and examined, but as to certain parts of his property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of his commission, and the prisoner was convicted, the judges, on a case reserved, held the conviction wrong. *Page's case, Russ. & Ry.* 392; 1 *Brod. & B.* 308.

In *Harris's case*, 1 *Den. C. C. R.* 461; *S. C.* 19; *L. J. M. C.* 11, the indictment charged that the bankrupt surrendered himself, &c., and was then and there duly sworn, &c., and duly submitted himself to be examined, &c., and that at the time of his said examination, &c., he was possessed of a certain real estate, to wit, &c., and that at the time of his said examination, and being so sworn as aforesaid, he then and there feloniously did not discover when he disposed of, assigned, and transferred the said real estate, &c. It was held that the indictment was bad for repugnancy, as it charged the prisoner with not discovering at the time of his examination when he disposed of an estate, which was averred to be in his possession at the time of his examination.

If on his examination the bankrupt refer to a document, as containing a full and true discovery of his estate and effects, it is incumbent on the prosecutor to produce that book, or to account for its non-production; for otherwise it cannot be known whether the effects have been concealed or not. *Evani's case*, 1 *Moody, C. C.* 70. It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed, after the issuing of the commission; it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, is the instrument of the concealment. See *Evani's case*, 1 *Moody, C. C.* 74. A secreting by a bankrupt of his goods is sufficient to constitute the offence under s. 251, although a full disclosure is afterwards made of the concealment to the commissioners before the bankrupt's last examination. *Courterion v. Meunier*, 6 *Ex.* 74; *S. C.* 20; *L. J. Ex.* 104, overruling *Walters's case*, 5 *C. & P.* 133. But the concealment must be wilful; an accidental omission will not be within the statute. *Id.*

The evidence of the concealment, and of the guilty intent with which the act is done, ought to be very satisfactorily made out, but in general it is so clear as to leave little doubt on the point. Concealment of goods in the houses of neighbours or of associates, or in secret places in the bankrupt's own house, or sending them away in the night, endeavouring to escape abroad with part of his

effects, &c., constitute the usual proofs in cases of this description. See *Alison, Principles Cr. Law of Scotland*, 571.

Proof of the value of the effects.] Where the prosecution is on the ground of concealing effects, it must be proved that those effects were of the value of 10*l.* And where the value is attached to all the articles collectively, as "one table, six chairs, and one carpet, of the value of 10*l.* and upwards," it is necessary to make out the offence as to every one of the articles, for the grand jury have only ascribed the value to all the articles *collectively*. *Forsyth's case, Russ. & Ry.* 274; 2 *Russ. by Grea.* 231.

Proof of intent to defraud.] Lastly, the prosecutor must prove the intent of the bankrupt to defraud his creditors. This will in general appear from the whole circumstances of the case. Evidence of it may likewise be gathered from the declarations of the prisoner.

Lord Denman, after consulting Patteson, J., held that an indictment, under the 6 Geo. 4, c. 16, s. 112, against a bankrupt for not surrendering, was bad, for not alleging that it was with intent to defraud his creditors; the words "with intent to defraud his creditors" applying to all the offences comprised in the section. *Hill's case*, 1 *C. & K.* 168. But see *Gordon's case*, 25 *L. J. M. C.* 19. The absconding of the bankrupt with the view of avoiding the examination, is good evidence of the intent, although by reason of such absconding the bankrupt may have had no knowledge of the proceedings in bankruptcy.

Venue.] An indictment for not surrendering cannot be sustained in a different county from that in which the bankrupt was a trader, or in which he committed an act of bankruptcy. *Maule, J.*, in *Milner's case*, 2 *C. & K.* 310.

BARRATRY.

A BARRATOR is defined to be a common mover, exciter or maintainer of suits or quarrels either in courts or in the country, and it is said not to be material, whether the courts be of record or not, or whether such quarrels relate to a disputed title or possession, or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow amongst neighbours, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator in respect of any number of false actions brought by him in his own right, unless, as it seems, such actions should be entirely groundless and vexatious, without any manner of colour. Nor is an attorney a barrator, in respect of his maintaining his client in a groundless action, to the commencement of which he was in no way privy. *Hawk. P. C. b.* 1, *c.* 81, *s.* 1, 2, 3, 4, ; 1 *Russ. by Grea.* 184.

Barratry is a cumulative offence, and the party must be charged as a *common barrator*. It is, therefore, insufficient to prove the commission of one act only. *Hawk. P. C. b.* 1, *c.* 81, *s.* 5. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular acts of barratry intended to be insisted on, without which the trial will not be permitted to proceed. *Ibid. s.* 13. The prosecution will be confined by these particulars. *Goddard* v. *Smith*, 6 *Mod.* 262.

The punishment of this offence is fine and imprisonment, and being held to good behaviour, and in persons of any profession relating to the law, the further punishment is added of being disabled to practise for the future. *Hawk. P. C. b.* 1, *c.* 81, *s.* 14; 34 Geo. 3, *c.* 1.

By the 12 Geo. 1, c. 29, s. 4, made perpetual by the 21 Geo. 2, c. 3, if any person convicted of common barratry shall practise as an attorney, solicitor, or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information, examine the matter in a summary way in open court, and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. This act was revived and made perpetual by 21 Geo. 2, c. 3. 1 *Russ. by Grea.* 185 (*n.*)

BIGAMY.

Former law, and 9 *Geo.* 4 *c.* 31.] THE offence of bigamy was originally only of ecclesiastical cognizance, but was made a felony by the 1 Jac. 1, c. 11. By the second section of that statute, it was provided that the act should not extend to any person or persons whose husband or wife should be continually remaining beyond the seas, by the space of seven years together, or whose husband or wife should absent him or herself, the one from the other, by the space of seven years together, in any parts within his Majesty's dominions; the one of them not knowing the other of them to be living within that time. By section 3, it was provided, that the act should not extend to any person or persons that are, or shall be, at the time of such marriage divorced by any sentence in the ecclesiastical court, or to any person or persons where the former marriage shall be by sentence in the ecclesiastical court declared to be void, and of no effect, nor to any person or persons in or by reason of any former marriage, had or made within age of consent.

By the 35 Geo. 3, c. 67, persons guilty of bigamy were made liable to the same punishment as persons convicted of fraud or petit larceny.

By the 9 Geo. 4, c. 31, (E.) both of the above statutes were repealed, and other provisions substituted in their place.

By that statute, s. 22, "if any person being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned with or without hard

labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county. Provided always, that nothing herein contained shall extend to any second marriage contracted out of England by any other than a subject of his Majesty; or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; or shall extend to any person who at the time of such marriage shall have been divorced from the bond of such first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

The Irish statute, 10 Geo. 4, c. 34, s. 26, is precisely similar, with the exception of omitting the words, "and every person counselling, aiding, or abetting such offender."

Upon an indictment for bigamy, the prosecutor must prove—1. the prisoner's first marriage; 2. the prisoner's second marriage; 3. that his first wife was alive at the time of the second marriage; and 4. that the second marriage took place either in the county in which he is tried, or that in which he was apprehended, or is in custody.

Proof of the marriages—in general.] The prosecutor must prove the two marriages, that at the time of the second marriage the offender was legally married to another. The law will not presume a valid marriage in cases of bigamy as it will in civil cases. *Smith* v. *Huson*, 1 *Phillimore*, 257; *Jacob's case*, 1 *Moody*, *C. C.* 140.

The repealed act of 1 Jac. 1 extended to a marriage *de facto*, as voidable by reason of consanguinity, affinity, or such like, for it was a marriage in law until it was avoided: and, therefore, though neither marriage be *de jure*, yet they were within that act. 3 *Inst.* 88; *Jacobs's case*, 1 *Moo. C. C.* 140.

As to the offence being committed, though the second marriage be void, *Bawm's case*, is an important decision. It was there held, that where a woman already married, and having a husband alive, married with the widower of the deceased sister, she is guilty of bigamy, though by the 5 & 6 Wm. 4, c. 54, such a marriage is declared to be null and void to all intents and purposes whatsoever. In deciding the point, Lord Denman, C. J., said, "I have no doubt whatever that this marriage was null and void under the act mentioned; but that circumstance does not in my opinion affect the charge against the female prisoner. Her offence consisted, not in the contracting that which, but for the existence of her husband, would have been a legal marriage, but in her going through the ceremony of marriage, and appearing to contract that which was a legal and binding union, at the time when she already had a husband living. That single fact constitutes the crime, and the proof of it, and whether the union secondly contracted, would or would not be null and void, if contracted under other circumstances, is a matter wholly immaterial to the inquiry. If it were otherwise in this case, the same argument would apply in all other cases; for if the second marriage be not null and void, the crime of bigamy cannot be committed. I am, therefore decidedly of opinion that Jane Bawm committed bigamy by marrying with Thomas Webbe, though it was within the prohibited

degrees of affinity." *Bawm's case*, 1 *Cox, C. C.* 34; *S. C.* 1 *C. & K.* 144. See *post*, p. 302.

But if a man marry his deceased wife's sister, and in the latter's lifetime marry another woman, he cannot be indicted for bigamy, inasmuch as the marriage with his deceased wife's sister was void. *Reg.* v. *Chadwick*, 11 *Q. B.* 173, *S. C.* 17, *L. J. M. C.* 33.

Although it was formerly held that the marriage of an idiot was valid, yet, according to modern determinations, the marriage of a lunatic, not in a lucid interval, is void. 1 *Bl. Com.* 438, 439; 1 *Russ. by Grea.* 216. And by the 15 Geo. 2, c. 30, (see also 51 Geo. 3, c. 37), if persons found lunatics under a commission, or committed to the care of trustees by any act of parliament, marry before they are declared of sound mind by the lord chancellor, or the majority of such trustees, the marriage shall be totally void.

It was held, under a former law, that where the second marriage was contracted in Ireland, or abroad, it was not bigamy, on the ground that that marriage, which alone constituted the offence, was a fact done in another jurisdiction, and though inquirable here for some purposes, like all transitory acts, was not, as a crime, cognizable by the rules of the common law. 1 *Hale, P. C.* 692; 1 *East, P. C.* 465; 1 *Russell*, 183. But now, by the 9 Geo. 4, c. 31, s. 22, the offence is the same, whether the second marriage shall take place in England or elsewhere.

The defendant's admission of a prior marriage is sufficient *primâ facie* evidence of a valid marriage. *Newton's case*, 2 *Moo. & R.* 503; *Simmonsto's case*, 1 *C. & K.* 164. But in *Flaherty's case*, 2 *C. & K.* 782, Pollock, C. B., told the jury that there ought to be some proof of the first marriage, beyond the mere statement of the prisoner when in custody.

The identity of the parties named in the indictment must be proved. Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson. Parke, J., held the proof to be insufficient, and directed an acquittal. He subsequently expressed a decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself Hannah Wilkinson*," because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name, and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Drake's case*, 1 *Lew. C. C.* 25.

If in a case of bigamy there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register which is produced to prove the first marriage, the prisoner must be acquitted; *unless* that discrepancy can be explained, or, in the absence of such proof, unless it can be shown that the first wife was known by both names. *Reg.* v. *Gooding, Carr. & M.* 297.

After proof of the first marriage, the second wife is a competent witness, for then it appears that the second marriage was void. *B. N. P.* 287; 1 *East, P. C.* 469.

An indictment for bigamy need not contain any other averment of

the subsistence of the first marriage at the time of the second, than is involved in the usual allegation "A. B., his former wife being then alive." *Murray* v. *the Queen*, (in error) 7 *Q. B.* 700, *S. C.* 14, *L. J. Q. B.* 357.

The form and validity of marriages will now be considered under the following heads,—marriages in England—marriages in Scotland—marriages in Ireland—marriages abroad—marriages abroad in British factories—marriages abroad in British colonies—marriages abroad in houses of ambassadors.

Proof of the marriages—marriages in England.] The principal marriage acts now in force in England are the 4 Geo. 4, c. 76, and 6 & 7 W. 4, c. 85.

Where the marriage has taken place in England, it may be proved by a person who was present at the ceremony, and who can speak to the identity of the parties, and it is not necessary to give evidence either of the registration of the marriage, or of any licence, or of any publication of banns. *Alison's case, Russ. & Ry.* 109. The usual evidence is a copy of the register, with proof of the identity of the parties.

By the act for registering births, deaths, and marriages in England, 6 & 7 Wm. 4 c. 86, s. 35, every rector, &c., and persons having the keeping of any register book, shall permit, search, and give certified copies of any entries therein. And by s. 38, certified copies of entries, purporting to be sealed or stamped with the seal of the general register office, established by the act, are to be received in evidence of the birth, death, or marriage to which they relate, without any further or other proof of such entries.

Upon an indictment for bigamy it appeared that the first alleged marriage took place in a Wesleyan chapel. A witness stated he was present and signed the register. The superintendent registrar was proved to have been present at the marriage. A witness stated, that he examined a certificate annexed to the case (by which, without purporting to be a copy or extract, the superintendent registrar certified, that the chapel was duly registered for solemnizing marriages pursuant to the 6 & 7 Wm. 4, c. 85), which he received from the superintendent registrar, with the register at his office, and that it was correctly extracted and signed by the superintendent registrar. It was held by the court of Criminal Appeal, that the chapel was proved to be a place at which marriages might be legally celebrated. *Manwaring's case*, 5 *Weekly Rep.* 119 (Nov. 22, 1856).

In *Sayer* v. *Glossop*, 2 *Ex. R.* 409; *S. C.* 17. *L. J. Ex.* 300, which was an action on bill of exchange with a plea of coverture, the marriage was proved by an examined copy of the register, and by a witness, who, having seen the original, swore to the handwriting of the alleged husband. This was held to be sufficient, and Parke, B., said; "I have tried, perhaps, more cases of bigamy than any other judge, and I do not recollect one in which the original register was produced at the trial."

The marriages of jews and quakers are excepted out of the 4 Geo. 4, c. 76; and see the 6 & 7 Wm. 4. c. 85, s. 2, *post*, 304. Where it was proposed to prove a jewish marriage by calling witnesses who were present at the ceremony in the synagogue, it was objected that such ceremony was only the ratification of a previous contract in writing, and the contract was accordingly produced and proved. *Horne* v. *Noel*, 1 *Campb.* 61; and see *Lindo* v. *Belisario*, 1 *Hagg.*

225, 247, *Appx.* p. 9; *Goldsmid* v. *Bromer, Id.* 234; 1 *Russ. by Grea.* 216. The marriages of quakers must be proved to be have taken place according to the customs of that sect. 1 *Hagg. Appx.* p 9, (*n.*). *Deane* v. *Thomas, M. & M.* 361.

The cases in which the validity of marriages in England has been questioned, on the ground of a noncompliance with the requisitions of the marriage act respecting the publication of banns and licences, will be considered under separate heads. Proof that the parties were not resident according to the provisions of the act, will not invalidate the marriage, whether it be by banns or licence; for by the 26th sec. of the 4 Geo. 4, c. 76, it is enacted, that after the solemnization of any marriage, whether by banns or licence, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the parish where the marriage is solemnized; nor shall any evidence in either of such cases be received to prove the contrary. See *Hind's case, Russ. & Ry.* 253; *Dobbin* v. *Cornack*, 2 *Phill.* 104; *Free* v. *Quin, Id.* 14.

Proof of the marriages—marriages in England, by banns.] In what cases a marriage shall be void, is declared by the 22nd sec. of the marriage act, 4 Geo. 4, c. 76, which enacts, "that if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by a special licence, or shall knowingly and wilfully intermarry without a publication of banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in the solemnization of such marriage, by any person not being in holy orders, the marriage of such persons shall be null and void."

With regard to the chapels in which banns may be lawfully published, it is enacted, by the 6 Geo. 4, c. 92, s. 2, that it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, in which churches and chapels it has been customary and usual before the passing of that act (6 Geo. 4,) to solemnize marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By sec. 3 of the marriage act, 4 Geo. 4, c. 76, "the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize by writing under his hand and seal, the publication of banns, and the solemnization of marriages in such chapels for persons residing in such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese."

To render a marriage without due publication of banns void, it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. *R.* v. *Wroxton*, 4 *B. & Ad.* 640. And, therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnization of the marriage, it was held to be a valid marriage. *Id.*; and see *Wiltshire* v. *Prince*, 3 *Hagg. Ecc. R.* 332. If the prisoner has been instrumental in procuring the banns of the second marriage to be published in a wrong name, he will not be allowed, on an indictment

for bigamy, to take advantage of that objection to invalidate such second marriage. The prisoner was indicted for marrying Anna T., his former wife being alive. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the wife was called Anna, and that she was married by that name, but that her real name was Susannah. On a case reserved, the judges held unanimously, that the second marriage was sufficient to constitute the offence, and that after having called the woman Anna in the note, it did not lie in his mouth to say that she was not as well known by the name of Anna, as by that of Susannah, or that she was not rightly called by the name of Anna, in the indictment. *Edwards's case*, *Russ. & Ry.* 283; 1 *Russell*, *by Grea.* 209. This principle was carried still further in a case before Mr. Baron Gurney. The second wife, who gave evidence on the trial, stated that she was married to the prisoner by the name of Eliza *Thick*, but that her real name was Eliza Browne, that she had never gone by the name of *Thick*, but had assumed it when the banns were published, in order that her neighbours might not know that she was the person intended. It being objected, on behalf of the prisoner that this was not a valid marriage, Gurney, B., said, "that applies only to the first marriage, and I am of opinion that the parties cannot be allowed to evade the punishment for the offence by contracting an invalid marriage." *Penson's case*, 5 *C. & P.* 412. In another case, where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved, on a reference to the judges, that the prisoner had been rightly convicted on this evidence. *Palmer's case*, *coram Bayley*, *J. Durham*, 1827, 1 *Deacon's Dig. C. L.* 147. See *ante*, p. 298.

The following rules laid down by Lord Tenterden, in a case upon the construction of the former marriage act, 26 Geo. 2, with regard to the validity of marriages celebrated by banns, must be taken subject to the limitation established in *R.* v. *Wroxton*, 4 *B. & Ad.* 640, *ante*, p. 301. If there be a total variation in a name or names, that is, if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, a marriage in pursuance of that publication is invalid, *and it is immaterial whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.* (But now see *R.* v. *Wroxton*, *supra.*) But secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used and been known by, at one time and not at another, in such cases the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motives of parties. *R.* v. *Tibshelf*, 1 *B. & Ad.* 195. A person whose name was *Abraham Langley* was married by banns by the name of *George Smith*; he had been known in the parish where he resided, and was married by the latter name only; the court of King's Bench held that this was a valid marriage under the 26 Geo. 2. *R.* v. *Billingshurst*, 3 *M. & S.* 250. The distinction between a name assumed for other purposes, and a name assumed for the purpose of practising a fraud upon the marriage laws, was clearly pointed out in the following

case. A man who had deserted from the army for the purpose of concealment assumed another name. After a residence of sixteen weeks in the parish he was married by licence in his assumed name, by which only he was known in the place where he resided. Lord Ellenborough said, "If this name had been assumed for the purpose of fraud, in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage act, and the rights of marriage, and the court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to become the name which the party has acquired by reputation, that is, within the meaning of the act, the party's real name." The marriage was accordingly held valid within the 26 Geo. 2, *R.* v. *Burton-upon-Trent*, 3 *M.* & *S.* 537. But where the marriage is celebrated in a wrong name for the purpose of carrying into effect a fraud upon the marriage laws, it is void; though, as it has been shown, it would not be so considered with regard to the second marriage upon a prosecution for bigamy, as against the party guilty of the fraud. *Ante*, p. 302. Where the banns are published in the name of *William*, the real name being *William Peter*, and the party being known by the name of *Peter*, and the suppression was for the purpose of effecting a clandestine marriage with a minor, without consent, the marriage was declared null and void. *Pouget* v. *Tomkins*, 1 *Phillimore*, 449. See also *Fellowes* v. *Stewart*, 2 *Phillimore*, 257; *Middlecroft* v. *Gregory*, *id.* 365. So where the wife at the time of her marriage personated another woman, in whose name banns had been previously published for an intended marriage with the husband. *Stayte* v. *Farquarson*, 2 *Add.* 282.

Where the first marriage was solemnised in a chapel, it is necessary to show either that the chapel is one in which banns had been usually published before the 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that act and before the 6 Geo. 4, c. 92, and proof that marriages have been solemnized there for the last twenty years is not sufficient for this purpose. *Per Platt, B.*, in *Bowen's case*, 2 *C.* & *K.* 227.

Proof of the marriages—marriages in England—by licence—minors.] Under the former marriage act, 26 Geo. 2, it was held, that if the marriage was by licence, and the prisoner proved that he was a minor at the time, it lay on the prosecutor to show that the consent required by the 11th section of the above act had been obtained, or that otherwise the marriage was void. *Butler's case*, *Russ.* & *Ry.* 61; *Morton's case*, *id.* 19, (*n.*); *James's case*, *id.* 17; *Smith* v. *Huson*, 1 *Phillimore*, 287. The law on this point has been altered by the marriage act, 4 Geo. 4, c. 76, s. 14, which merely requires consent, and has no words making marriages solemnized without such consent *void*. The statute therefore is regarded as *directory* only, and a marriage by a minor without the consent of his father, then living, has been held valid. *R.* v. *Birmingham*, 8 *B.* & *C.* 29; 2 *Man.* & *Ry.* 230. So in the interval between the time of the 3 Geo. 4, c. 75, (by which certain parts of the 26 Geo. 2, relating to consent of parents, &c. were repealed) receiving the royal assent, and the time when it began to operate, a marriage by licence solemnized without consent, was held valid. *R.* v. *Waully*, 1 *Moo. C. C.* 163.

By the 6 & 7 Wm. 4, c. 85, s. 10, the like consent shall be required to any marriage in England solemnized by licence, as would have

been required by law to marriages solemnized by licence immediately before the passing of the act; and every person whose consent to a marriage by licence, is required by law, is thereby authorised to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by licence or without licence.

But by s. 25, after the solemnization of any marriage, it shall not be necessary, in support of such marriage, to give proof of the consent of any person whose consent thereunto is required by law.

Marriages under the 6 & 7 Wm. 4, c. 95.] By this statute persons may be married, either by license or without license, in places of worship to be duly registered under the act for solemnizing marriages therein, or before the superintendent registrar, on giving such notice and obtaining such certificate from him as therein specified.

By sec. 42, marriages are declared void, if unduly solemnized with the knowledge of both parties.

By sec. 2 of this act, the society of friends, called quakers, and persons of the jewish religion, may continue to contract and solemnize marriage according to their respective usages; and every such marriage is declared valid, provided that the parties to such marriage be both of the said society, or both persons professing the jewish religion; provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have issued as after provided. Where the marriage is solemnized under this act, the certificate therein mentioned, coupled with evidence of the identity of the parties, is sufficient *primâ facie* proof of the marriage. *Hawes's case*, 1 *Den. C. C. R.* 270.

Proof of the marriages—marriages in Scotland.] A marriage in Scotland, irregular by the Scotch law, subjecting the parties to censure there, is yet regarded as a valid marriage, according to the laws of England. In *Trueman's case*, the following was held to be sufficient evidence of a Scotch marriage. A witness proved that he knew the prisoner; that Mary Russell, his first wife, was still alive; that the prisoner acknowledged he had been married to her in Scotland, and once showed the witness a paper which he said was a certificate of marriage. The prisoner not producing this paper according to notice, a copy of it was proved with the prisoner's acknowledgment of his own handwriting to the original. The writing in question purported to be a proceeding before a court in Scotland, reciting an act of *Car.* 2, *parl.* 1, *sess.* 1, *c.* 34, respecting marrying in a clandestine and disorderly manner, and continued thus, "Nevertheless, true it is. I. T. and M. R. were married within the three months last past, by some person not authorised by the kirk, and without proclamation of banns, and therefore should be fined in the terms of the act to deter others from committing the like." It then stated a personal warning against the defendants, and was signed "Jno. Truman and Mary Russell," and indorsed by two witnesses. There was then an adjudication of the fine. Upon this evidence, together with due proof of the second marriage, the prisoner was convicted; and a question was reserved for the opinion of the judges, whether the first marriage was legally proved. All the judges present were of opinion, that it was legally proved. It was observed by two of their lordships that the case did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of a copy of a proceeding against him for having improperly con-

tracted the first marriage. But some thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment, and one of them, referring to the case of *Morris* v. *Miller* (4 *Burr*. 2059), observed that there was a distinction between an action for criminal conversation and an indictment for this offence; that in the former the acknowledgment and cohabitation of the plaintiff could not prove his marriage as against the defendant; and the acknowledgment of the defendant in such an action of the plaintiff's marriage might be of a fact not within his own knowledge, as it must be if a defendant in bigamy admitted his own marriage. *Truman's case*, 1 *East*, *P. C.* 470.

In order to prove that a marriage in Scotland is valid according to the law of Scotland, the witness must be one conversant with the law of Scotland as to marriages. Therefore, where a woman was called as a witness, who said, that she was present at a ceremony performed in a private house in Scotland by a minister of some religious denomination, that she herself was married in the same way, and that parties always married in Scotland in private houses; this was held by the Court of Criminal Appeal insufficient, and the conviction was quashed. *Povey's case*, 1 *Dear. C. C. R.* 32, *S. C.* 22 *L. J. M. C.* 19.

In the *Sussex Peerage case*, 11 *Cl. & Finn.* 134, the lord chancellor stated, that it was the opinion of all the judges and the lords, that *Dent's case*, 1 *C. & K.* 97, in which a witness, an unprofessional person, who said that he was born and educated in Scotland, and was acquainted with the law of Scotland, was allowed to prove the marriage law of Scotland, was not law. In the *Sussex Peerage case*, Cardinal Wiseman having stated that it had become necessary, for the discharge of his duties as coadjutor to the bishop for the central division of England, that he should have made himself acquainted with the canon law with reference to matrimonial cases, and that he had done so, was held to be a witness *peritus virtute officii* to give evidence of what was the law of Rome regulating the marriages of Roman Catholics; Lord Langdale said, "His evidence is of the nature of that of a judge: it is impossible to say he is incompetent."

In a recent publication on the criminal law of Scotland, the following observations are made on the subject, whether a marriage irregular, but not *void*, by the Scotch law, is sufficient to support an indictment for bigamy. "The most important question in the law of bigamy is, whether both marriages must be by formal celebration, or whether the charge lies, though one of them, or both have been contracted in that loose and unceremonious manner which is sustained by the law of Scotland. In those cases where *both* the matrimonial connections were of this ambiguous character, there seems to be no doubt that no prosecution for bigamy can lie, and that a second wife who marries either by promise and *copula*, courtship and acknowledgment, or habit and repute, takes her chance of a previous matrimonial connection having been contracted in the same irregular manner. Where the first marriage has been regular, but the second clandestine, the offending party seems entitled to plead that he truly never did intend to marry at all, but was bent upon a connection of a different nature, and that the partner of his crime has herself to blame, for not having taken those precautions by proclamation of banns, and otherwise, which the law has provided for that very case. But in the case of *George Storey*, *Dumfries*, *April*, 1824, Lord Jus-

tice Clerk Boyle sustained as relevant a charge of bigamy where the second marriage was a clandestine one, solemnized at Annan after the fashion of that place. In regard to the most unfavourable case for a defendant, that of a regular marriage following a clandestine matrimonial connection, it deserves consideration, that possibly the man did not intend to marry in the first instance, and was entirely ignorant that he had involved himself in its bonds; a situation by no means unlikely to occur when it is recollected how many men under the present law of Scotland do not know whether they are married or not; and how long an investigation is frequently required to enable others to determine the point. So that, as the law cannot sustain a criminal prosecution where the criminal intent is not apparent, it rather appears, though there is no decided case expressly in point, that there are not the requisite materials for a prosecution for bigamy, unless both marriages were formal. In the case of *John Roger, Aberdeen, September*, 1813, it appeared that the defendant had had a connection with Mary Innes, with whom he had cohabited many years, and had a family. The woman having been brought before the kirk session and rebuked for fornication, the defendant, in presence of the minister, admitted that she had yielded in consequence of a promise of marriage on his part, upon which the minister, somewhat rashly, declared them married persons, much against the prisoner's will. They afterwards cohabited as man and wife, as there was a promise and *copula* and marriage by habit and repute, but as the case was of an ambiguous character, the jury, under the direction of Lord Gillies, found the defendant not guilty, a verdict evidently implying that a charge of bigamy could not be supported where the first marriage was of this irregular and disputed description. If, however, the first marriage, though clandestine, has gradually assumed the character and consistence of a regular connection, and the parties have lived together in that way for a length of time, there seems to be little doubt that a second regular marriage, following such a permanent and acknowledged *status*, with another woman, will expose to the pains of bigamy." *Alison's Princ. Cr. Law of Scot.* 536. See *Graham's case*, 2 *Lew. C. C.* 97.

As to marriages contracted in Scotland, see now the 19 & 20 Vict. c. 96, s. 2, which requires twenty-one days' residence of the parties in order to make their marriage valid.

Proof of the marriages—marriages in Ireland.] It seems not to be essential to the validity of marriage in Ireland that the ceremony should take place in a church. Where it had been performed by a dissenting minister in a private room, the recorder was clearly of opinion that it was valid, on the ground that as before the marriage act a marriage might have been celebrated in England in a house, and it was only necessary by positive law to celebrate it in a church, some law should be shown requiring dissenters to be married in a church; whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, enacts, that all marriages between protestant dissenters, celebrated by a protestant dissenting teacher, shall be good, without saying at what place they shall be celebrated. *Anon, O. B. coram Sir J. Silvester*, 1 *Russ. by Grea.* 214. So where a marriage was celebrated at a private house in Ireland by a clergyman of the Church of England, the curate of the parish, Best, C. J., held it to be valid. He said, "When I find that this marriage was performed by a gentleman who had officiated as curate of the parish for eighteen years,

I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant [it was an action in which coverture was pleaded] to the production of a licence or to any further proof. It is true that in a case for bigamy, tried before Mr. Justice Bayley, on the northern circuit, an acquittal was directed, because the first marriage, which took place in Ireland, was performed in a private house; but I have reason to know that that learned judge altered his opinion afterwards, and was satisfied of the validity of the first marriage." *Smith* v. *Maxwell*, *Ry. & Moo. N. P. C.* 80. The case referred to by Best, C. J., appears to be that of *R.* v. *Reilly*, 3 *Chetw. Burn.* 726, in which there was no direct evidence that the law of Ireland permitted a marriage to be celebrated at a private house. In Ireland, the marriage of two Roman Catholics by a roman catholic priest is good. Where a person who has a wife living at the time of the second marriage declared himself to be a roman catholic, and the woman was a roman catholic, Alderson, B., held that this was a good marriage as against him, and that he would not, on being indicted for bigamy, or in respect of such second marriage, be allowed to set up, as a defence to the charge, that he was a protestant. To prove the second marriage the second wife was called, who stated that A. acted as a roman catholic priest, and that the marriage took place in his house, as was usual with the marriages of roman catholics in Ireland; that before the commencement of the marriage service, the priest asked the prisoner if he was a roman catholic, and he answered that he was; that a part of the ceremony was in Latin, and the remainder in English, and that the priest having asked the prisoner if he would take the witness as his wife, and having asked her if she would take the prisoner for her husband, and each having answered in the affirmative, he pronounced them married. Held that the marriage was sufficiently proved. *Orgill's case*, 9 *C. & P.* 80. Where the first marriage was in Ireland, and it appeared that one of the parties was under age, and no consent of parents was proved, the judges after referring to the Irish marriage act, 9 Geo. 2, c. 11, were of opinion, that though that act has words to make such a marriage void, yet other parts of the statute show that it is voidable only, and any proceedings to avoid it must be taken within a year; and they therefore held the first marriage binding. *Jacob's case*, 1 *Moody, C. C.* 140.

The 5 & 6 Vic. c. 113, and the 6 & 7 Vic. c. 39, were passed to confirm marriages by protestant and other dissenting ministers.

Marriages in Ireland are now regulated by the 7 & 8 Vict. c. 81,

(*Queen* v. *Millis*, 10 *C. & F.* 534, in which the question was, as to the validity of a present contract of marriage performed by a presbyterian minister), is similar to the 6 & 7 Wm. 4, c. 85 (*ante*, p. 304), which relates to England. It specially provides for marriages in Ireland between parties, one or both of whom are presbyterians, permitting such marriages to be solemnized in certified meeting-houses. It allows the celebration of marriage, under certain forms and regulations, to take place in registered buildings, and before the registrar at his office. By s. 3, however, it is enacted, "that nothing in this act contained shall affect any marriages by any roman catholic priest which may now be lawfully celebrated, nor extend to the registration of any roman catholic chapel, but such marriages may

continue to be celebrated in the same manner, and subject to the same limitations and restrictions, as if this act has not been passed." By ss. 45, 46, 47, persons unduly solemnizing marriage, and registrars unduly issuing certificates of marriage in Ireland, are declared guilty of felony.

Proof of the marriages—marriages abroad.] The general principle with regard to marriages contracted in a foreign country is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere. *Story on the Conflict of Laws*, 104: citing *Story* v. *Story*, 2 *Phill. Ecc. Rep.* 332; *Herbert* v. *Herbert*, 3 *Phill. Ecc. Rep.* 58; *Dalrymple* v. *Dalrymple*, 2 *Hagg. Cons. Rep.* 54; *Ruding* v. *Smith*, 2 *Hagg. Cons. Rep.* 390, 391; *Scrimshire* v. *Scrimshire*, 2 *Hagg. Cons. Rep.* 395; *Ilderton* v. *Ilderton*, 2 *H. Bl.* 145; *Middleton* v. *Saucerin*, 2 *Hagg.* 437; *Lacon* v. *Higgins*, 3 *Stark. N. P. C.* 178; 2 *Kent. Com. Lect.* 26, p. 91 (2*nd ed.*); 2 *Kaims on Eq. b.* 3, *c.* 8, *s.* 1. The most prominent, if not the only exceptions to this rule, are those relating to polygamy and incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves by special circumstances to the benefit of the laws of their own country. *Story on the Conflict of Laws*, 104.

The first exception to the general rule mentioned by Mr. Justice Story is that relating to polygamy and incest. These Christianity is understood to prohibit, and no Christian country, therefore, would recognise polygamy, or an incestuous marriage. But with regard to the latter, he takes a distinction between marriages incestuous by the law of nature, and such as are incestuous by the positive code of a state; and upon this point, he cites a judgment of one of the American courts: "If," say the court, "a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage would not be allowed to have any validity here; but marriages not naturally unlawful, but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be held valid in a state where they are not allowed." *Greenwood* v. *Curtis*, 6 *Mass. Rep.* 378. "Indeed," continues Mr. Justice Story, "in the diversity of religious opinions in Christian countries, a large space must be allowed for interpretation as to religious duties, rights, and solemnities. In the catholic countries of continental Europe, there are many prohibitions of marriage which are connected with religious establishments and canons, and in most countries there are positive or customary prohibitions which involve peculiarities of religious opinion or conscientious doubt. It would be most inconvenient to hold all marriages celebrated elsewhere void, where not in scrupulous accordance with local institutions." *Story on the Conflict of Laws*, 107.

With regard to the second exception, the prohibitions depending upon positive law, they apply only in strictness to the subjects of a country. *Story*, 108. An illustration of this may be found in the civil code of France, which annuls (art. 174) marriages by Frenchmen in foreign countries, who are under incapacity by the laws of France. *Ibid.*

The third exception arises in cases of moral necessity, and has been applied to persons residing in factories, in conquered places, and in

desert or barbarous countries, or in countries of an opposite religion, who are permitted to contract marriage there according to the laws of their own country. In short, wherever there is a local necessity, from the absence of laws, or the presence of prohibitions or obstructions not binding upon other countries, or from peculiarities of religious opinion and conscientious scruple, or from circumstances of exemption from local jurisdiction, marriages will be allowed to be valid according to the law of the native domicile. *Ibid*, citing *Ruding* v. *Smith*, 2 *Hagg. Cons. R.* 371, 384, 385, 386; *Lautour* v. *Tresdale*, 8 *Taunt.* 830; 2 *Marsh*, 243; *R.* v. *Inhabitants of Brampton*, 10 *East*, 282. It has recently been established in *The Queen* v. *Millis*, 10 *C. & F.* 534, that by the common law of England a marriage between British subjects, although celebrated according to the rites of the English church, is void, unless solemnized in the presence of a minister of that church; and, in accordance with that decision, it has been held, that where A. and B., both being members of the church of England, were married at the consulate office at Beyrout, in Syria, by an American missionary, according to the rites of the church of England, such marriage was invalid. *Catherwood* v. *Caslon*, 13 *M. & W.* 261. Although it is an established rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else, yet it has not been *è converso* established that marriages of British subjects, not good according to the law of the place where celebrated, are universally and under all possible circumstances to be regarded as invalid in England. It is certainly the safest course to be married according to the law of the country, for then no question can be raised; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. *Per Lord Stowell*, *Ruding* v. *Smith*, 2 *Hagg. Cons. Rep.* 371. In proving a marriage abroad, it must appear that the ceremony performed was the marriage ceremony according to the foreign law. Thus where, on an indictment for bigamy, before the 26 Geo. 2, it appeared that the first marriage, which was with a roman catholic woman in England, was performed by a catholic priest not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witness not understanding, could not swear even that the ceremony according to the church of Rome was read, the defendant was directed to be acquitted. *Lyon's case*, *O. B.* 1 *East*, *P. C.* 469.

In proving a marriage which has taken place abroad, evidence must be given of the law of the foreign state, in order to show its validity. For this purpose, a person skilled in the laws of the country should be called. *Lindo* v. *Belisario*, 2 *Hagg.* 248; *Middleton* v. *Janvers*, 2 *Hagg.* 441. But see *Horford* v. *Morris*, 2 *Hagg.* 431. Some obscurity seems to exist with regard to the mode of proving foreign laws in English courts. The rule, as at present understood, appears to be, that the written law of a foreign state must be proved by a copy duly authenticated. *Clegg* v. *Levy*, 3 *Campb.* 166. With regard to the mode of authenticating it, the following case has occurred. In order to prove the law of France respecting marriage, the French vice-consul was called, who produced a copy of the *Cinq Codes*, which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government. *Sir Thomas Picton's case*, 30 *How. St. Tr.* 514, was referred to as an authority in favour of admitting this evidence, but it appears that there the evidence was received by consent. 30 *St. Tr.* 494. Abbott, J., said

that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but according to his recollection, printed books on the subject of the law of Spain were referred to and acted on in argument in *Sir T. Picton's case*, as evidence of the law of that country, and therefore he should act on that authority, and receive the evidence. *Lacon* v. *Higgins*, *Dowl. & Ry.* N. P. C. 38; 3 *Stark.* 178. The House of Lords, in the *Sussex Peerage case*, *supra*, held that a witness to foreign law must be a person *peritus virtute officii, or virtute professionis.* A roman catholic bishop, holding in this country the office of coadjutor to a vicar apostolic, and, as such, authorised to decide on cases arising out of marriages affected by the law of Rome, was therefore held in virtue of his office to be a witness admissible to prove the law of Rome as to marriages. In the same case it was held, that a professional or official witness giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinions, but the law itself must be taken from his evidence. 11 *Cl. & Finn.* 134. See also *Povey's case*, *infra*, p. 305.

The practice with regard to the proof of foreign laws in the United States is as follows:—The usual modes of authenticating foreign laws there, are by an exemplification under the great seal of state; or by a copy proved to be a true copy; or by the certificate of an officer authorised by law, which certificate itself must be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath; sometimes, however, certificates of persons in high authority have been allowed as evidence. *Story on the Conflict of Laws*, 530.

Proof of the marriages—marriages abroad in British factories.] On the subject of the mode of performing marriages in British factories abroad, Lord Stowell has made the following observations. "What is the law of marriage in all foreign establishments, settled in countries professing a religion essentially different? In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the East, Smyrna, Aleppo, and others, in all of which (some of these establishments existing under authority, by treaties, and others under indulgence and toleration,) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek church, but to the rubric of the church of England, when he contracts a marriage with an Englishwoman. Nobody can suppose that, whilst the Mogul empire existed, an Englishman was bound to consult the *Koran* for the celebration of his marriage. Even where no foreign connexion can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey, is left to depend, I presume, upon their own canons, without any reference to Mahomedan ceremonies. There is a *jus gentium* in this matter, an amity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in their transactions of marriage. It may be difficult to say, *à priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned

the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong. (See *Portreis* v. *Tondear*, *Hagg. Cons. Rep.* 136, and the 4 Geo. 4, c. 91, s. 2.) I am not aware of any judicial determination on this point, but the reputation which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question were brought to judgment." *Ruding* v. *Smith*, 2 *Hagg. Cons. Rep.* 371.

The validity of marriages celebrated in the chapel of any British factory abroad, or in the house of any British subject residing at such factory, is recognised by the statute 4 Geo. 4, c. 91, s. 2 (*stated post*, 312.)

Proof of the marriages—marriages in British colonies.] What form of celebration will confer validity on a marriage in a British colony, must depend upon the peculiar circumstances of the case. This question came before Lord Stowell, in a case in which the validity of such marriage, celebrated at the Cape of Good Hope, between English subjects, by a chaplain of the British forces, then occupying that settlement under a capitulation recently made, was brought before him for his decision. After some observations (which have already been cited, *ante*, p. 308,) he held the marriage valid, on the ground of the distinct British character of the parties, on their independence of the Dutch law, on their own British transactions, on the insuperable obstacles of obtaining any marriage conformable to the Dutch law, on the countenance given by British authority and British administration to this transaction, and on the whole country being under British dominion. *Ruding* v. *Smith*, 2 *Hagg. Cons. Rep.* 371; *Story on the Conflict of Laws*, 111. A similar question arose in a case before the court of King's Bench, respecting the legitimacy of a pauper. A soldier on service with the British army in St. Domingo, being desirous of marrying the widow of another soldier, who had died there, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest, the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the pauper to be the marriage service of the church of England. After eleven years' cohabitation, this was held to be sufficient evidence that the marriage was properly celebrated, although the pauper (the wife) stated that she did not know that the party officiating was a priest. Lord Ellenborough considered the case, first as a marriage celebrated in a place where the law of England prevailed (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them,) and held that it would be a good marriage by that law; for it would have been a good marriage in this country before the marriage act, and consequently would be so now in a foreign colony to which that act does not extend. In the second place he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular, and held that the facts stated would be evidence of a good marriage according to the law of the country, whatever it might be, and that upon such facts every presumption was to be made in favour of the validity of the marriage. *R.* v. *Brampton*, 10 *East*, 282.

So a marriage between two British subjects at Madras, celebrated by a catholic priest, not conformably to the laws of the natives of

India, nor with the licence of the governor, which it had been the uniform custom to obtain, was held valid. *Lautour* v. *Teesdale*, 8 *Taunt.* 833; 2 *Marsh*, 243.

Proof of marriages—abroad—in houses of ambassadors, &c.] It appears that before the passing of the statute 4 Geo. 4 c. 91, a marriage celebrated in the house of an English ambassador abroad was held valid. *R.* v. *Brampton*, 10 *East*, 286; *Ruding* v. *Smith*, 2 *Hagg. Cons. Rep.* 371. And now, by the first section of that statute, reciting that "it is expedient to relieve the minds of all his majesty's subjects from any doubt of the validity of marriages, solemnized by a minister of the church of England in the chapel or house of any British ambassador, or minister residing within the country, to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad;" it is enacted, "that all such marriages shall be deemed and held to be as valid in law, as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law."

Sec. 2 provides that the act shall not confirm, or impair, or affect the validity of any marriage solemnized beyond the seas, save and except such as are solemnized as therein specified and recited.

Marriages in Newfoundland are regulated by the statute 5 Geo. 4, c. 68, repealing the 57 Geo. 3, c. 51.

Venue.] The stat. 9 Geo. 4, like that of 1 Jac. 1, enacts, that the prisoner may be tried in the county in which he is apprehended.

Upon the latter statute, it was held that the prisoner, having been apprehended for larceny in the county of W., and a true bill having been found against him while in custody under that charge for bigamy, he might be tried for the latter offence in the county of W. *Jordan's case*, *Russ. & Ry.* 48. The second marriage was at Manchester, and a warrant was issued by a magistrate there to apprehend the prisoner. He having removed to London, surrendered to one of the police magistrates there, who admitted him to bail. On his trial at the Old Bailey, the court on an objection taken by his counsel, were of opinion, that as *the warrant* had not been produced, and as it had not proved that the prisoner was *apprehended* in the county of Middlesex, the court had no jurisdiction to try him *Forsyth's case*, 2 *Leach*, 826. But now, by the 9 Geo. 4, the prisoner may be tried in the county in which he is *in custody*.

But on a crown case reserved, eleven of the judges being present, it was decided (Parke, B., Alderson, B., and Maule, B., *dissentibus*), that an indictment for bigamy, found in a different county from that where the offence was committed, need not allege that the prisoner was in custody at the time of the finding the inquisition, in the county of the finding. *Reg.* v. *Whiley*, 2 *Moo. C. C.* 186. "In the marginal note of this case given by the reporter, the word 'not' is omitted, and it is in other respects erroneously reported." *Per Parke, B.*, in *Smythies's case*, 1 *Den. C. C. R.* 499.

Proof from the prisoner under the exceptions.] The prisoner may

prove under the first exception in the 9 Geo. 4, c. 31, s. 16, that he is not a subject of his majesty, and that the second marriage was contracted out of England. A British subject, resident in England, married a second wife in the lifetime of the first, both marriages taking place in Scotland; it was held that he might be indicted and convicted of bigamy in England. *Topping's case*, 25 *L. J. M. C.* 72.

Secondly, he may prove that his wife has been continually absent from home for the space of seven years last past, and was not known by him to be living within that time. There is no exception as in the 1 Jac. 1, with regard to persons "continually remaining beyond the seas for the space of seven years together." That statute, like the 9 Geo. 4, contained an exception, exempting persons absent, without knowledge of the other party of their being alive. The question, whether a prisoner, setting up this defence, ought to show that he has used reasonable diligence to inform himself of the fact, and whether, if he neglects the palpable means of availing himself of such information, he will stand excused, does not appear to be decided. 1 *East. P. C.* 467; 1 *Russ. by Grea.* 187. It seems that the true construction of the exception is this: not that the party charged, to be deprived of the benefit of its provision as to defence, must have known at the time when he contracted the second marriage, that the first wife had been alive during the seven years preceding, but that to bring him within that provision, he must have been ignorant, during the whole of those seven years, that she was alive. *Reg.* v. *Cullen*, 9 *C. & P.* 681. Where the prisoner's first wife had left him sixteen years, and the second wife proved that she had known him for about ten years living as a single man, and that she had never heard of the first wife, who appeared to have been living seventeen miles from where the prisoner resided; Cresswell, J., held that he was entitled to be acquitted under the foregoing exception. *R.* v. *Jones*, *Carr & M.* 614. This point was raised before, but not determined by, the Court of Criminal Appeal in *Mary Briggs's case*, *Mich. Term*, 1856.

The third exception is, where the party, at the time of the second marriage, has been divorced from the bond of the first marriage. The words of the 1 Jac. 1, were "divorced by the sentence of any ecclesiastical court," and were held to extend to a divorce *à mensâ et thoro.* 1 *Hale P. C.* 694; 4 *Bl. Com.* 164; 1 *East, P. C.* 467. But now a divorce *à vinculo matrimonii*, must be proved. It is not sufficient to prove a divorce out of England, where the first marriage was in this country. The prisoner was indicted for bigamy under the 1 Jac 1. It appeared that he had been married in England, and that he went to Scotland, and procured there a divorce *à vinculo matrimonii*, on the ground of adultery, before his second marriage. This, it was insisted for the prisoner, was a good defence under the third exception in the statute 1 Jac. 1; but on a case reserved, the judges were unanimously of opinion that no sentence or act of any foreign country could dissolve an English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England, and that no divorce of an ecclesiastical court was within the exception in sec. 3 of 1 Jac. 1 unless it was the divorce of a court within the limits to which the 1 Jac. 1 extends. *Lolley's case*, *Russ. & Ry.* 237.

The fourth exception is, where the former marriage has been declared void by the sentence of any court of competent jurisdiction. The words in the statute of 1 Jac. 1 were, "by sentence in the ecclesiastical court;" and under these, it was held that a sentence of the

spiritual court against marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the counsel for the crown from proving the marriage, the sentence having decided on the validity of the marriage only collaterally, and not directly. *Duchess of Kingston's case*, 11 *St. Tr.* 262, *fo. ed.*; 20 *How. St. Tr.* 355; 1 *Leach*, 146.

The 9 Geo. 4, unlike the 1 Jac. 1, contains no exception with regard to cases where the first marriage was within the legal age of consent, that is, fourteen in a male, and twelve in a female. 1 *Bl. Com.* 436; *Gordon's case*, *Russ. & Ry.* 48. It has been observed, that notwithstanding this omission, no judge, probably, would direct a jury to find a party guilty of bigamy, where the first marriage was within that age, and not followed up by any subsequent agreement or cohabitation, after the parties had attained that age. 1 *Deac. Dig. C. L.* 143.

BRIBERY.

Nature of the offence.] Bribery is a misdemeanour punishable at common law. Bribery in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place, taking any valuable thing except meat and drink of small value of any man who has to do before him in any way, for doing his office, or by colour of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also bribery sometimes signifies the taking or giving a reward for offices of a public nature. *Hawk. P. C. b.* 1, *c.* 67, *ss.* 1, 2, 3.

An attempt to bribe is a misdemeanour, as much as the act of successful bribery, as where a bribe is offered to a judge, and refused by him. 3 *Inst.* 147. So it has been held, that an attempt to bribe a cabinet minister for the purpose of procuring an office, is a misdemeanour. *Vaughan's case*, 4 *Burr.* 2494. So an attempt to bribe, in the case of an election to a corporate office is punishable. *Plumpton's case*, 2 *Ld. Raym.* 1377.

Bribery at elections for members of parliament.] Bribery at elections for members of parliament, is an offence at common law, punishable by indictment or information, and the statute 2 Geo. 2. c. 24, which imposes a penalty upon such offence, does not affect that mode of proceeding. *Pitt's case*, 3 *Burr.* 1339; 1 *W. Bl.* 380. Where money is given it is bribery, although the party giving it take a note from the voter, giving a counter note, to deliver up the first note when the elector has voted. *Sulston* v. *Norton*, 3 *Burr.* 1235; 1 *W. Bl.* 317. So also a wager with a voter, that he will not vote for a particular person. *Loft*, 552; *Hawk, P. C. b.* 1, *c.* 67, *s.* 10 (*n*).

Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election; it was held not to be an offence within the 2 Geo. 2, c. 24, s. 7. *Lord Huntingtower* v. *Gardiner*, 1 *B. & C.* 297.

If A. give money to B. to induce him to vote for a candidate, and B. agree to do so in consideration of the gift, A. is liable to the penalty of 500*l.* for corrupting B. to vote within the 2 Geo. 2, c. 24, s. 7, though B. does not give the vote; and a jury may infer the agreement from circumstances, although B., who is a witness, does not state that he ever intended to vote. *Henslow* v. *Fawcett*, 3 *Ad. & E.* 51. If, in fact, B. never did so intend, A.'s offence was complete by his giving the money for the purpose of inducing B. to vote, and by B.'s professedly accepting it on these terms, *Per Patteson and Coleridge, JJ. Ib.* See also *Webb* v. *Smith*, 4 *Bing. N. C.* 373.

As to the payment of the travelling expenses of voters, see 1 *Russ. by Grea.* 159; the cases there cited, and *Cooper* v. *Slade*, 25 *L. J. Q. B.* 324.

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By the 5 & 6 Vict. c. 102, (U. K.) s. 20, the payment of head money is declared bribery; and see s. 22, for preventing treating.

By the 4 & 5 Vict. c. 57, on a charge of bribery before a committee of the house of commons, evidence of bribery may be given without first proving agency. And see now the Corrupt Practices Prevention Act, 17 & 18 Vict. c. 102.

As to bribery at municipal elections, see 5 & 6 Wm. 4, c. 76, s. 54, and *Harding* v. *Stokes*, *Tyr. & Gr.* 599; 2 *M. & W.* 233.

As to bribing officers of the customs, see 3 & 4 Wm. 4, c. 51, s. 8; and *Everett's case*, 8 *B. & C.* 114.

The Irish statute, 1 Geo. 4, c. 11, s. 25, enacts, that every returning officer who shall be, by due course of law, convicted of having acted corruptly or partially in the execution of his duty as returning officer at any election of a member or members to serve in parliament, shall be adjudged guilty of high misdemeanor, and shall be imprisoned for a period not exceeding three years, and such person so convicted is hereby declared to be for ever incapable of holding any office or situation, civil or military, under the crown.

BRIDGES.

Indictment for not repairing.] Upon an indictment for a nuisance to a public bridge, whether by obstructing or neglecting to repair it, the prosecutor must prove, first, that the bridge in question is a public bridge; and secondly, that it has been obstructed or permitted to be out of repair, and in the latter case, the liability of the defendants to repair.

Proof of the bridge being a public bridge.] A distinction between a public and a private bridge is taken in the *2nd Institute*, p. 701, and made to consist principally in a public bridge being built for the common good of all the subjects, as opposed to a bridge made for private purposes: and though the words "public bridges" do not occur in the 22 Hen. 8, c. 5, (called the statute of bridges), yet as that statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken *in the highways*," and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge *in a highway* is a public bridge for all purposes of repair connected with that statute. 1 *Russ. by Grea.* 385. A public bridge may be defined to be such a bridge as all his Majesty's subjects have used freely, and without interruption, as of right, for a period of time competent to protect themselves, and all who should thereafter use them, from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use may be questioned. *Per Lord Ellenborough*, *R.* v. *Inhab. of Bucks*, 12 *East*, 204. With regard to bridges newly erected, the general rule is, that if a man builds a bridge, and it becomes useful to the county in general, it shall be deemed a public bridge, (but see the regulations

prescribed by the 43 Geo. 3, c. 59, s. 5, *post*, p. 322,) and the county shall repair it. But where a man builds a bridge for his own private benefit, although the public may occasionally participate with him in the use of it, yet it does not become a public bridge. *R.* v. *Inhab. of Bucks*, 12 *East*, 203, 204. Though it is otherwise, if the public have constantly used the bridge, and treated it as a public bridge. *R.* v. *Inhab. of Glamorgan*, 2 *East*, 356 (*n*). Where a miller, on deepening a ford, through which there was a public highway, built a bridge over it which the public used, it was held that the county was bound to repair. *R.* v. *Inhab. of Kent*, 2 *M. & S.* 513. A question has sometimes arisen whether arches adjacent to a bridge, and under which there is passage for water in times of flood, are to be considered either as forming part of the bridge, or as being themselves independent bridges. Where arches of this kind existed, more than 300 feet from a bridge, on an indictment against the county for non-repair of them, and a case reserved, the court of King's Bench held that the county was not liable. *R.* v. *Inhab. of Oxfordshire*, 1 *Barn. & Ald.* 297 (*n*). *Second indictment*, *Id.* 289. The rule laid down by Lord Tenterden, C. J., in the latter case was, that the inhabitants of a county are bound, by common law, to repair bridges erected over such water only as answers the description of *flumen vel cursus aquæ*, that is, *water flowing in a channel between banks more or less defined*, although such channel may be occasionally dry. But where a structure, called Swarkeston Bridge, was 1275 yards long; at the eastern end were five arches under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine-arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county, for the non-repair of the structure, describing the whole as a bridge, it was held that it was properly so described, and that the verdict was properly entered for the crown. *R.* v. *Inhab. of Derbyshire*, 2 *Gale & Dav.* 97. Before the 43 Geo. 3, c. 59, a bridge had been built over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. Cresswell, J., left it to the jury, whether this structure was a bridge, for, if so, their verdict must be for the crown. If it had been erected for the convenience of the public in passing over the stream of water, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built. *R.* v. *the Inhab. of Gloucestershire*, *Carr. & M.* 506. In the following case, a question arose whether a bridge for foot-passengers, which had been built adjoining to an old bridge for carriages, was parcel of the latter. The carriage-bridge had been built before 1119, and certain abbey-lands were charged with the repairs. The proprietors of those lands had always repaired the bridge so built. In 1765, the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey-lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly con-

nected with it by brick work and iron pins, and partly resting on the stone work of the bridge. Held that the foot-bridge was not parcel of the old carriage-bridge, but a distinct structure, and that the county was bound to repair it. *R.* v. *Inhab. of Middlesex*, 3 *B. & Ad.* 201.

Where the trustees under a turnpike act build a bridge across a stream, where a culvert would be sufficient; yet if the bridge become upon the whole more convenient to the public, the county cannot refuse to repair it. *R.* v. *Inhab. of Lancashire*, 2 *B. & Ad.* 813.

Semble, that an arch of nine feet span without battlements at either end, over a stream usually about three feet deep, is a culvert and not a bridge to be repaired by the county; and if the parish have pleaded guilty to a former indictment, which described it as a part of the road, they are concluded by having so done. *Whitney's case*, 3 *Ad. & E.* 69; 7 *C. & P.* 208, *S. C.*

But a foot-bridge consisting of three oak planks about nine or ten feet long, and carrying a public footpath over a small stream, is not such a bridge as the county is bound to repair as a county bridge. *R.* v. *Inhab. of Southampton*, 21 *L. J. M. C.* 201.

The public may enjoy a limited right only of passing over a bridge; as where a bridge was used at all times by the public, on foot, and with horses, but only occasionally with carriages, viz., when the ford below was unsafe to pass, and the bridge was sometimes barred against carriages by means of posts and a chain; it was held that this was a public bridge, with a right of passage limited in extent, yet absolute in right. *R.* v. *Inhab. of Northampton*, 2 *M. & S.* 262. A bar across a public bridge locked, except in times of flood, has been ruled to be conclusive evidence that the public have only a limited right to use the bridge at such times, and it is at variance to state, that they have a right to use it "at their free will and pleasure." *R.* v. *Marquis of Buckingham*, 4 *Campb.* 189. But where a bridge passed over a ford, and was only used by the public in times of floods, which rendered the ford impassable, yet, as it was at all times open to the public, Abbott, C. J., ruled that the county was bound to repair. *R.* v. *Inhab. of Devon*, *Ry. & Moo. N. P. C.* 144.

Proof of the bridge being a public bridge—highway at each end.] At common law the county is bound *primâ facie* to repair the highway at each end of a public bridge, and by the statute 22 Hen. 8, c. 5, the length of the highway to be thus repaired is fixed at 300 feet. If indicted for the non-repair of such portion of the highway, they can only excuse themselves by pleading specially, as in the case of the bridge itself, that some other person is bound to repair by prescription, or by tenure. *R.* v. *Inhab. of West Riding of Yorkshire*, 7 *East*, 588; 5 *Taunt*, 284; *S. C. in the House of Lords*. The inhabitants of Devon erected a new bridge within 300 feet next adjoining to an old bridge in the county of Dorset; which 300 feet the county of Dorset was bound to repair. It was held, nevertheless, that Devon was bound to repair the new bridge, which was a distinct bridge, and not to be considered as an appendage to the old bridge. *R.* v. *Inhab. of Devon*, 14 *East*, 477.

A party who is liable by prescription to repair a bridge is also *primâ facie* liable to repair the highway to the extent of 300 feet from each end; and such presumption is not rebutted by proof that the party has been known only to repair the fabric of the bridge, and that the only repairs known to have been done to the highway have been

performed by commissioners under a turnpike road act. *R.* v. *City of Lincoln*, 8 *A.* & *E.* 65; 3 *N.* & *P.* 273.

Now by the 5 & 6 Wm. 4, c. 50, s. 21, "if any bridge shall hereafter be built (*i. e.* after the 20th of March, 1836), which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case, all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge, bound to repair the said highway: provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeway, and raised approaches to any such bridge, or the land arches thereof."

Dedication of a bridge to the public.] As there may be a dedication of a road to the public (see *post, Highways*), so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. See *Glasburne Bridge case*, 5 *Burr.* 2594; *R.* v. *Inhab. of Glamorgan*, 2 *East*, 356; *R.* v. *Inhab. of West Riding of Yorkshire*, 2 *East*, 342; *post*, 321, 322. And though where there is such a dedication, it must be absolute, yet it may be definite in point of time. See *R.* v. *Inhab. of Northampton*, 2 *M.* & *S.* 262; and the other cases cited *ante*, p. 319; also 1 *Russ. by Grea.* 387. A canal company may dedicate a bridge to the public; *Grand Surrey Canal* v. *Hall*, 1 *M.* & *Gr.* 393; where it was held that there was nothing in the constitution of the company, or in the nature of their property, to prevent them from making such a dedication.

Proof of the bridge being out of repair.] The county is only chargeable with *repairs*, and cannot be indicted for not widening or enlarging a public bridge, which has become from its narrowness inconvenient to the public. Not being bound to make a new bridge, the county is not bound to enlarge an old one, which is, *pro tanto*, the erection of a new bridge. *R.* v. *Inhab. of Devon*, 4 *B.* & *C.* 670.

Those who are bound to repair bridges must make them of such height and strength, as may be answerable to the course of the water, whether it continue in the old channel or make a new one. *Hawk. P. C. b.* 1, *c.* 77, *s.* 1.

Proof of the liability of the defendants—by the common law.] All public bridges are *primâ facie* repairable at common law, by the inhabitants of the county, and it lies upon them, if the fact be so, to show that others are bound to repair. *R.* v. *Inhab. of Salop*, 13 *East*, 95; 2 *Inst.* 700, 701; *R.* v. *Inhab. of Oxfordshire*, 4 *B.* & *C.* 196.

A bridge now locally situated within the limits of a borough, which was enlarged by 2 & 3 Wm. 4. c. 64, but before the passing of that act was situated without the limits of the borough, and in a county which had up to that time always repaired it; it was held that the county was still liable to repair it. *Reg.* v. *New Sarum*, 7 *Q. B.* 241, *S. C.* 15 *L. J. M. C.* 15; see *Reg.* v. *Brecon*, 15 *Q. B.* 813; 19 *L. J. M. C.* 203.

But a parish or township, or other known portion of a country, may, by usage and custom, be chargeable to the repair of a bridge erected in it. *Per. cur. R.* v. *Ecclesfield*, 1 *B. & A.* 359. So where it is within a franchise. *Hawk. P. C. b.* 1, *c.* 77, *s.* 1. The charge may be cast upon a corporation aggregate, either in respect of the tenure of certain lands, or of a special prescription, and in the same manner, it may be cast upon an individual, *ratione tenuræ. Id.* Where an individual is so liable, his tenant for years in possession is under the same obligation. *Reg.* v. *Bucknall*, 2 *Ld. Raym.* 792. Any particular inhabitant of a county, or any of several tenants of lands charged with such repairs, may be indicted singly for not repairing, and shall have contribution from the others. *Hawk. P. C. b.* 1, *c.* 77, *s.* 3; 2 *Ld. Raym.* 792. The inhabitants of a district cannot be charged *ratione tenuræ*, because they cannot as such, hold lands. *R.* v. *Machynlleth*, 2 *B. & C.* 166. But a parish, as a district, may at common law, be liable to repair a bridge, and may therefore be indicted for the not repairing, without stating any other ground of liability than immemorial usage. *R.* v. *Inhab. of Hendon*, 4 *B. & Ad.* 628. An indictment charged that there was in township A. an immemorial public bridge, and that the inhabitants of A. had been used, &c. from time whereof, &c. to repair the said bridge. Plea, not guilty. On the trial it appeared that the inhabitants had repaired an immemorial bridge, but that in one year within memory they had widened the roadway of the bridge from nine to sixteen feet: it was held, that whether the added part were repairable by the township or not, there was no variance between the indictment and the evidence. *Semble*, per Lord Denman, C. J., and Patteson, J., that the township was liable to repair the added part. *Reg.* v. *the Inhab. of Adderbury*, 5 *Q. B.* 187.

The liability of a county to the repairs of a bridge, is not affected by an act of parliament imposing tolls, and directing the trustees to lay them out in repairing the bridge. This point arose, but was not directly decided in the case of *R.* v. *Inhab. of Oxfordshire*, 4 *B. & C.* 194, the plea in that case not averring that the trustees had funds; but Bayley, J., observed, that even then a valid defence would not have been made out, for the public had a right to call upon the inhabitants of the county to repair, and *they* might look to the trustees under the act. With regard to highways, it has been decided that tolls are in such cases only an auxiliary fund, and that the parish is primarily liable. (See *post*, *Highways*.) And as the liability of a county resembles that of a parish, these decisions may be considered as authorities with regard to the former.

Proof of the liability of the defendants—by the common law—new bridges.] Although a private individual cannot by erecting a bridge, the use of which is not beneficial to the public, throw upon the county the *onus* of repairing it, yet if it become useful to the county in general, the county is bound to repair it. *Glusburne Bridge case*, 5 *Burr.* 2594. *Reg.* v. *Ely*, 15 *Q. B.* 827; *S. C.* 19 *L. J. M. C.* 223. Thus, where to an indictment for not repairing a public bridge, the defendants pleaded that H. M. being seised of certain tin works, for his private benefit and utility, and for making a commodious way to his tinworks, erected the bridge, and that he and his tenants enjoyed a way over the bridge for their private benefit and advantage, and that, therefore, he ought to repair; and on the trial the statements in the plea were proved, but it also appeared that the public had constantly used the bridge from the time of its being built; Lord

Kenyon directed the jury to find a verdict for the crown, which was not disturbed. *R.* v. *Inhab. of Glamorgan*, 2 *East*, 356, (*n.*)

Where a new bridge is built, the acquiescence of the public will be evidence that it is of public utility. As to charge the county, the bridge must be made on a highway, and as, while the bridge is making, there must be an obstruction of the highway, the forbearing to prosecute the parties for such obstruction, is an acquiescence by the county in the building of the bridge. See *R.* v. *Inhab. of St. Benedict*, 4 *B. & A.* 450. The evidence of user of a *bridge* by the public, differs from the evidence of user of a highway, for as a bridge is built on a highway, the public using the latter must necessarily use the former, and the proof of adoption can hardly be said to arise, but the user is evidence of acquiescence, as showing that the public have not found or treated the bridge as a nuisance. See *R.* v. *Inhab. of West Riding of Yorkshire*, 2 *East*, 342. Where a bridge is erected under the authority of an act of parliament, it cannot be supposed to be erected for other purposes than the public utility. *Per Lawrence*, *J.*, *R.* v. *Inhab. of West Riding of Yorkshire*, 2 *East*, 352. If a bridge be built in a slight or incommodious manner, it cannot be imposed as a burthen on the county, but may be treated altogether as a nuisance, and indicted as such. *Per Lord Ellenborough*, *Ibid.*

And by the 43 Geo. 3, c. 59, s. 5, no bridge to be thereafter erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction of the county surveyor, or person appointed by the justices of the peace, at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions.

The words of this act comprehend every kind of person by whom, or at whose expense a bridge shall be built. Trustees appointed under a local turnpike act are "individuals" or "private persons" within the statute, and therefore a bridge erected by such trustees after the passing of the act, and not under the direction of the county surveyor, is not a bridge which the county is bound to repair. *R.* v. *Inhab. of Derby*, 3 *B. & Ad.* 147. A bridge built before the above statute, but widened since, is not a new bridge within the act. *R.* v. *Lancashire*, 2 *B. & Ad.* 813. So where the woodwork of a bridge was washed away, leaving the stone abutments, and the parish repaired the bridge, partly with the old wood and partly with new, this was held not to be a bridge "erected or built" within the above statute, but an old bridge repaired, and the county was held liable. *R.* v. *Inhab. of Devon*, 5 *B. & Ad.* 383; 2 *N. & M.* 212.

Proof of the liability of the defendants—public companies.] In some cases where public companies have been authorised by the legislature to erect or alter bridges, a condition has been implied that they shall keep such bridges in repair. The proprietors of the navigation of the river Medway were by their act empowered to alter or amend such bridges and highways as might hinder the navigation; *leaving them, or others as convenient, in their room.* Having

deepened a ford in the Medway, the company built a bridge in its place, which being washed away, they were held bound to rebuild. Lord Ellenborough said that the condition to repair was a continuing condition, and that the company having taken away the ford, were bound to give another passage over the bridge, and to keep it in repair. *R.* v. *Inhab. of Kent*, 13 *East*, 220. The same point was ruled in the case of *the King* v. *the Inhabitants of the parts of Lindsay* (14 *East*, 317) in which the company had made a cut through a highway, and built a bridge over it. An act of parliament empowered the commissioners for making navigable the river Waveney, to cut, &c., but was silent as to making bridges. The commissioners having cut through a highway, and rendered it impassable, a bridge was built over the cut, along which the public passed, and the bridge was repaired by the proprietors. Being out of repair, the proprietor of the navigation was held liable to the repairs. The court said that the cut was made, not for public purposes, but for private benefit; and the county could not be called upon to repair, for it was of no advantage to them to have a bridge instead of solid ground. *R.* v. *Kerrison*, 3 *M. & S.* 326. See also *R.* v. *Inhab. of Somerset*, 16 *East*, 305; *Grand Surrey Canal* v. *Hall*, 1 *M. & Gr.* 392. *Reg.* v. *Ely*, 15 *Q. B.* 827; *S. C.* 19 *L. J. M. C.* 223; *Reg.* v. *Brecon*, 15 *Q. B.* 813. *S. C.* 19 *L. J. M. C.* 203.

A corporation aggregate, or a railway company, are liable to be indicted in their corporate capacity for the non-repair of bridges, which it is their duty to repair. *Per Parke, B.*, *R.* v. *Birmingham & Gloucester Railway Company*, 9 *C. & P.* 469. See also *S. C.* 3 *Q. B.* where the same point was decided.

Proof of liability—defendants, individuals.] *Ratione tenuræ* implies immemoriality. 2 *Saund.* 158 *d.* (*n.*). And, therefore, upon an indictment against an individual for not repairing, by reason of the tenure of a mill, if it appear that the mill was built within the time of legal memory, he must be acquitted. *Hayman's case*, *Moo. & M.* 401. Any act of repairing on the part of an individual, is *primâ facie* evidence of his liability. Thus, it is said, that if a bishop has once or twice, of alms, repaired a bridge, this binds not, yet it is evidence against him that he ought to repair, unless he proves the contrary. 2 *Inst.* 700.

Patteson, J., in *Antrobus's case*, 6 *C. & P.* 790, held, that reputation was not evidence on an indictment against an individual for not repairing a bridge, *ratione tenuræ*. See also *Reg.* v. *Wavertree*, 2 *M. & R.* 253.

But on an indictment for the non-repair of a bridge, *ratione tenuræ*, it was held that a record of 18 Edw. 3, setting out a presentment of the bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly followed by a grant of pontage from the crown, on the ground that it had been found, by inquest, that no one was liable to repair the bridge, was admissible in evidence to negative any immemorial liability to repair *ratione tenuræ*: and the jury after finding a verdict of acquittal also found that the bridge had been recently built, and that no one was liable to repair it. *Semble* that such finding by a jury, in ancient times, was admissible as reputation on a question as to the liability to repair *ratione tenuræ*. *Sutton's case*, 3 *N. & P.* 569; 8 *A. & E.* 516. *S. C.* In this conflict of authorities, the question came before the Court of Queen's Bench in the recent case of *Reg.* v. *Bedford*, 24 *L. J. Q. B.* 81,

when the court decided, that on the trial of an indictment against the county of B., to which they pleaded that A. was liable, *ratione tenuræ*, to repair a portion of the bridge, evidence of reputation that A. and his predecessors were liable to do the repairs to that part, was admissible.

Proof in defence—by counties.] Where a county is indicted, and the defence is that a parish or other district, or a corporation, or individual, is liable to the repairs, this defence must be specially pleaded, and cannot be given in evidence under the general issue of *not guilty*. *R.* v. *Inhab. of Wilts*, 1 *Salk.* 359; 2 *Lord Raym.* 1174; 1 *Russ. by Grea.* 404; 2 *Stark. Ev.* 191, 2*nd ed.* Upon that plea the defendants can only give evidence in denial of the points which must be established on the part of the prosecution, viz. 1, that the bridge is a public one; 2, that it is within the county; and, 3, that it is out of repair. 2 *Stark. Ev.* 191, 2*nd ed.* With a view to the first point, the inhabitants of a county may show under *not guilty*, that a district or individual is bound to repair, as a medium of proof that the bridge is not a public bridge. *Id. R.* v. *Inhab. of Northampton*, 2 *M. & S.* 262. For repairs done by an individual are to be ascribed rather to motives of interest in his own property than to be presumed to be done for the public benefit. *Per Ld. Ellenborough, Ibid.*

Upon a special plea by a county, that some smaller district or some individual is liable to repair, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual. 2 *Stark. Ev.* 192, 2*nd ed.*

The 5 & 6 Wm. 4, c. 76, enlarging the boundaries of certain cities and boroughs in England and Wales for the purposes therein mentioned, does not relieve a county from the repair of a bridge situated within the new limit of a borough, but which, previous to the act, was without the old limit, and repairable by the county at large. *R.* v. *Inhab. of New Sarum*, *ante*, p. 320.

Proof in defence—by minor districts, or individuals.] Where a parish, or other district, or a corporation, or individual, not chargeable of common right with the repairs of a bridge, is indicted, they may discharge themselves under the general issue. *R.* v. *Inhab. of Norwich*, 1 *Str.* 177. For as it lies on the prosecutor specially to state the grounds on which such parties are liable, they may negative those parts of the charge under the general issue. 1 *Russ. by Grea.* 404; *sed vide R.* v. *Hendon*, 4 *B. & Ad.* 628, *ante*, p. 321.

Proof in defence—by corporation.] A corporation may be bound by prescription to repair a bridge, though one of their charters within time of legal memory use words of incorporation, and though the bridge may have been repaired out of the funds of a guild: for such repairs will be taken to have been made in case of the corporation. *R.* v. *Mayor, &c. of Stratford-upon-Avon*, 14 *East*, 348.

Venue and trial.] By the 1 Ann. st. 1, c. 18, s. 5, "all matters concerning the repairing and amending of the bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere." It seems that no inhabitant of a county ought to be a juror on a trial of an issue whether the

county is bound to repair. *Hawk. P. C. b.* 1, *c.* 77, *s.* 6. In such cases, upon a suggestion, the *venire* will be awarded into a neighbouring county. *R.* v. *Inhab. of Wilts*, 6 *Mod.* 307; 1 *Russ. by Grea.* 405.

Costs.] By the 13 Geo. 3, c. 78, s. 64, courts before whom indictments were tried for non-repair of highways were empowered to award costs to the prosecutor, to be paid by the person or persons indicted, if the defence should appear to be frivolous. By the 43 Geo. 3, c. 59, s. 1, the several penalties, forfeitures, *matters and things*, in the said act (13 Geo. 3, c. 78,) relating to highways, were extended and applied, as far as the same were applicable, to bridges and roads at the ends thereof, as fully and effectually as if the same were therein repealed and re-enacted. The 13 Geo. 3, c. 78, was repealed by 5 & 6 Wm. 4, c. 50, the highway act, which by s. 5 only extends to bridges (not being county bridges).

It has been recently held that, notwithstanding the 13 Geo. 3, c. 78, was repealed by the 5 & 6 Wm. 4, c. 50, yet that the 43 Geo. 3, c. 59, incorporated the former act, and kept alive the power of the court or judge, where the defence was frivolous to grant costs. *R.* v. *Inhab. of Merionethshire*, 6 *Q. B.* 343; *S. C.* 13 *L. J. M. C.* 158.

Maliciously pulling down bridges, &c.] By the 7 & 8 Geo. 4, c. 30, s. 13, and the 9 Geo. 4, c. 86 (I.) s. 14, "if any person shall unlawfully and maliciously pull down, or in anywise destroy any public bridge, or do any injury with intent, and so as thereby, to render such bridge or any part thereof, dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years; or to be imprisoned for any term not exceeding four years, and if a male to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment."

BURGLARY.

Offence at common law.] Burglary is a felony at common law, and a burglar is defined by Lord Coke as "he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 *Inst.* 63. And this definition is adopted by Lord Hale. 1 *Hale, P. C.* 549; *Hawk. P. C. b.* 1, *c.* 38, *s.* 1.

Statute 7 *&* 8 *Geo.* 4, *c.* 29, *&c.*] By the 7 & 8 Geo. 4, c. 29, s. 11 (the 9 Geo. 4, c. 55, Irish), it was enacted, "that every person convicted of burglary shall suffer death as a felon;" and it is thereby *declared*, "that if any person shall enter the dwelling-house of another, with intent to commit felony; or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary."

By the 7 Wm. 4 & 1 Vict. c. 86, s. 1 (which extends to Ireland as well as England), so much of the above acts as relates to the punishment of any person convicted of burglary, and of principals in the second degree, and of accessaries before and after the fact in that offence, is repealed; and by s. 2, it is enacted, "that whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years."

By s. 7, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

Burglary and assault with intent to murder, &c.] By the 7 Wm. 4, & 1 Vict. c. 8[illegible], s. 2, "whosoever shall burglariously break and enter into any dwelling-house, and shall assault, with intent to murder, any person being therein, or shall stab, cut, wound, beat, or strike any person, shall be guilty of felony, and being convicted thereof shall suffer death."

This sentence may be recorded.

The evidence to support an indictment under this section of the statute, will be the same as that required on an indictment for simple burglary, see *post;* and in addition the prosecutor must prove that the prisoner assaulted the party named in the indictment, then being in the house, with intent to murder, which intent may be

inferred from the circumstances. If, instead of assaulting with intent to murder, the charge be, that the prisoner stabbed, cut, wounded, beat, or struck some person, proof must be given of such stabbing, &c. The latter part of the section does not seem to require that the person stabbed, &c. shall be in the dwelling-house at the time that the violence is used towards him. Two prisoners were indicted for burglary, and it appeared that one in endeavouring to escape, had used great violence, and seriously injured the prosecutor. The jury found him guilty on the whole indictment of burglary committed with violence; the other prisoner was convicted of burglary without violence. Lord Denman said, "It is proper to observe, that if two persons set about the commission of a crime, and one of them in the execution of their common purpose, uses violence, both may be convicted of the whole offence; but if the violence used by the one take place after the other has escaped, and is resorted to merely to prevent being captured, then only the one actually using it is within the meaning of the statute." *Reg.* v. *Harvey and Caylor*, 1 *Cox, C. C.* 21.

Evidence in burglary.] Upon the trial of an indictment for the offence of burglary,' the prosecutor must prove, 1, the breaking; 2, the entering; 3, that the house broken and entered was a mansion-house; 4, that the breaking and entry were in the night-time; 5, that the breaking and entering were with intent to commit a felony.

The offence of breaking out of a mansion-house in the night-time will be treated of separately.

Proof of the breaking.] What shall constitute a *breaking* is thus described by Hawkins:—"It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c., or draw any thing out of a house through a door or window which was open before, or enter into the house through a door open in the day-time, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary. *Hawk. P. C. b.* 1, *c.* 38, *ss.* 4, 5.

Proof of breaking—general instances.] Breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing a latch, when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window, with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; these are all proofs of a breaking. 2 *East, P. C.* 487; 1 *Russ. by Grea.* 786.

Proof of the breaking—doors.] Entering the house through an open door is not, as already stated, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time,

through an open door or window, and when within the house turns the key of, or unlatches, a chamber-door, with intent to commit felony, it is a burglary. *Hale, P. C.* 553. So where the prisoner entered the house by a back-door which had been left open by the family, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street-door on the inside and went out; this was held by the judges to be burglary. *Johnson's case*, 2 *East, P. C.* 488. So where the master lay in one part of the house, and the servants in another, and the stair-foot door of the master's chamber was latched, and a servant in the night unlatched that door, and went into his master's chamber with intent to murder him, it was held burglary. *Haydon's case, Hutt.* 20; *Kel.* 67; 1 *Hale, P. C.* 554; 2 *East, P. C.* 488.

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage,) was an open entrance or gateway, capable of admitting waggons, intended for the purpose of loading them with flour, through a large aperture communicating with the floor above. This aperture was closed by folding-doors with hinges, which fell over it and remained closed with their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller, J., held that this was a sufficient breaking to constitute the offence of burglary. *Brown's case*, 2 *East, P. C.* 487. In another case, upon nearly similar facts, the judges were equally divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges, including Lord Ellenborough, C. J., and Mansfield, C. J., thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. *Callan's case, Russ. & Ry.* 157. It has been observed, that the only difference between this and *Brown's case* (*supra*,) seems to be, that in the latter there were no internal fastenings, which in *Callan's case* there were; but that in neither case were any in fact used, but that the compression or fastening, such as it was, was produced by the mere operation of natural weight in both cases. *Russ. & Ry.* 158. (*n.*) The authority of *Brown's case* has been since followed, and that decision may now be considered to be law.

Upon an indictment for burglary, the question was, whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase: the entrance to the cellar from the outside was by means of a flap which let down: the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. *Russell's case*, 1 *Moody, C. C.* 377.

Unless a distinction can be drawn between breaking into a house

and breaking out of it, this case seems to overrule *Lawrence's case*, 4 *C. & P.* 231, *post.*

Proof of the breaking—windows.] Where a window is open, and the offender enters the house, this is no breaking, as already stated, *ante*, p. 328. And where the prisoner was indicted for *breaking* and entering a dwelling-house and stealing therein, and it appeared that he had effected an entrance by pushing up or raising the lower sash of the parlour-window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a *breaking*. *Smith's case*, 1 *Moody C. C.* 178. A square of glass in the kitchen-window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed. The aperture formed by the half square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement. One of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done he removed the fastening of the casement; the window being thus opened the two prisoners entered the house. The doubt which the learned judges (Alderson, J., consulting Patteson, J.) entertained, arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house), from enlarging an aperture by lifting up further the sash of the window, as in *Smith's case, supra;* but the learned judges thought it was worth considering whether in both cases the facts did not constitute, in point of law, a sufficient breaking. Upon a case reserved, all the judges who met were of opinion, that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening, the window. *Robinson's case*, 1 *Moody, C. C.* 327. See *R.* v. *Bird*, 9 *C. & P.* 44.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. *Hall's case*, *Russ & Ry.* 355. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weight only, is a breaking, although there is an outer shutter which is not fastened. *Haine's case*, *Russ. & Ry.* 451. So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened. *Per Park and Coleridge, J. J.*, *R.* v. *Hyam*, 7 *C. & P.* 441.

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, Vaughan, B., ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. *Lewis's case*, 2 *C. & P.* 628. A shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling lined with iron; held that the breaking and entering of the shutter-box did not constitute burglary. *Paine's case*, 7 *C. & P.* 135.

Proof of the breaking—chimneys.] It was one time considered doubtful whether getting into the chimney of a house in the night-time, with intent to commit a felony, was a sufficient *breaking* to constitute burglary. 1 *Hale P. C.* 552. But it is now settled that this is a breaking: for though actually open, it as much inclosed as the nature of the place will allow. *Hawk, P. C. b.* 1 *c.* 38, *s.* 6; 2 *East, P. C.* 485. And accordingly it was so held, in a late case, by ten of the judges, (contrary to the opinion of Holroyd, J., and Burrough, J.) Their lordships were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner, by lowering himself in the chimney made an entry into the dwelling-house. *R.* v. *Brice, Russ. & Ry.* 450.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *Sprigg's case*, 1 *Moo. & R.* 357.

Proof of the breaking—fixtures, cupboards, &c.] The breaking open of a moveable chest or box in a dwelling-house, in the night-time, is not such a breaking as will make the offence burglary, for the chest or box is no part of the mansion-house. *Foster*, 108; 2 *East, P. C.* 488. Whether breaking open the door of a cupboard let into the wall of a house, be burglary or not, does not appear ever to have been solemnly decided. In 1690, a case in which the point arose, was reserved for the opinion of the judges, and they were equally divided upon it. *Foster*, 108. Lord Hale says that such a breaking will not make a burglary at common law. 1 *Hale, P. C.* 527. Though on the authority of *Simpson's case, Kel.* 31; 2 *Hale, P. C.* 358, he considers it a sufficient breaking within the stat. 39, Eliz. c. 15. In the opinion of Mr. Justice Foster, however, *Simpson's case* does not warrant the latter position. *Foster*, 108; 2 *East, P. C.* 489. And see 2 *Hale, P. C.* 358 (*n.*) Mr. Justice Foster concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for the purpose be considered in no other light than as mere moveables. *Foster*, 109; 2 *East, P. C.* 489.

Proof the breaking—walls.] Whether breaking a *wall*, part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Lord Hale, after citing 22 *Assiz.* 95, which defines burglary to be "to break houses, churches, *walls*, courts, or *gates*, in time of peace," says—"by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night breaks the *wall* or the gate thereof, and finding the doors of the gate open enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary." 1 *Hale, P. C.* 559. Upon this passage an annotator of the *Pleas of the Crown* observes, "This was anciently understood only of the walls or gates *of the city* (vide Spelman, *in verbo Burglaria*). If so, it will not support our author's conclusion, wherein he applies it to the wall of a private house." *Id.* (*n.*) *ed.* 1778. It has been likewise observed upon this passage, that the distinction between breaking,

and coming over the wall or gate, is very refined, for if it be part of the mansion, for the purpose of burglary, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary. 2 *East, P. C.* 488. In these observations another writer of eminence concurs. 1 *Russ. by Grea.* 789.

Proof of the breaking—gates.] Where a gate forms part of the outer fence of a dwelling-house only, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates open into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. *Bennett's case, Russ. & Ry.* 289. So where the prisoner opened the area gate of a house in London with a skeleton-key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. *Davis's case, Russ. & Ry.* 322.

Proof of breaking—constructive breaking—fraud.] In order to constitute such a breaking as will render the party subject to the penalties of burglary, it is not essential that force should be employed. There may be a constructive breaking by fraud, conspiracy, or threats, which will render the person who is party to it equally guilty as if he had been guilty of breaking with force. Where, by means of fraud, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary. Thieves came with a pretended hue and cry, and requiring the constable to go with them to search for felons, entered the house, bound the constable and occupier, and robbed the latter. So where thieves entered a house, pretending that the owner had committed treason; in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 *Hale, P. C.* 552, 553. The prisoner knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house and went off. This being in the night-time, was held by Holt, C. J., Tracy, and Bury, to be burglary. *Hawkins's case, 2 East, P. C.* 485. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 *East, P. C.* 485. So where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him. *Kel.* 52, 53; *Hawk. P. C. b.* 1, *c.* 38, *s.* 9.

Proof of the breaking—constructive breaking—conspiracy.] A

breaking may be effected by conspiring with persons within the house, by whose means those who are without effect an entrance. Thus, if A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door and lets him in, this according to *Dalton* (*cap.* 99) is burglary in C. and larceny in A. But according to Lord Hale, it is burglary in both; for if it be burglary in C. it must necessarily be so in A., since he is present and assisting C. in the committing of the burglary. 1 *Hale, P. C.* 553. John Cornwall was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the night-time opened the street-door and let in the other prisoner, who robbed the house, after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted on the trial whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, and Cornwall was executed. *Cornwall's case*, 2, *Str.* 881; 4 *Bl. Com.* 227; 2 *East, P C.* 486. But if a servant, pretending to agree with a robber, open the door, and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *Reg.* v. *Johnson, Carr. & M.* 218.

Proof of breaking—constructive breaking—menaces.] There may also be a breaking in law, where, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of force, or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 *East, P. C.* 480. But if the owner only throw the money out of the house to the thieves who assault it, this will not be burglary. *Id. Hawk. P. C. b.* 1, *c.* 38, *s.* 3. Though if the money were taken up in the owner's presence, it would be robbery. But in all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 *East, P. C.* 486; *Hale, Sum.* 80.

Proof of breaking—constructive breaking—by one of several.] Where several come to commit a burglary, and some stand to watch in adjacent places, and others enter and rob, in such cases the act of one is, in judgment of law, the act of all, and all are equally guilty of the burglary. 1 *Hale, P. C.* 439, 534; 3 *Inst.* 63; 2 *East, P. C.* 486. So where a room-door was latched, and one person lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch to assist him to enter, and they screened him from observation by opening an umbrella. It was held by Gaselee, J., and Gurney, B., that the two were, in law, parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time it was perpetrated. *Jordan's case*, 7 *C. & P.* 432.

Where the breaking is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. *Id.*

Proof of the entry.] It is not sufficient to show a *breaking* only; the prosecutor must also prove an *entry* as well as a breaking, and both must be in the night and with intent to commit a felony, otherwise it is no burglary. 1 *Hale, P. C.* 555. If any part of the body be within the house, hand or foot, this is sufficient. *Foster*, 108; 2 *East, P. C.* 490. Thus where the prisoner cut a hole through the window-shutters of the prosecutor's shop, and putting his hand through the hole, took out watches, &c., but no other entry was proved, this was held to be burglary. *Gibbon's case, Foster*, 108. So where the prisoner broke a pane of glass in the upper sash of a window (which was fastened in the usual way by a latch) and introduced his hand within, for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. *Bailey's case, Russ. & Ry.* 341. The prosecutor standing near the window of his shop, observed the prisoner with his finger against part of the glass. The glass fell inside by the force of his finger. The prosecutor added, that standing as he did in the street, he saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. *Davis's case, Russ. & Ry.* 499.

The getting in at the top of the chimney, as already stated, *ante*, p. 331, has been held to be a *breaking*, and the prisoner's lowering himself down the chimney, though he never enters the room, has been held to be an entry. *Brice's case, Russ. & Ry.* 451.

Proof of entry—introduction of fire-arms or instruments.] Where no part of the offender's body enters the house, but he introduces an instrument, whether that introduction will be such an entry as to constitute a burglary, depends, as it seems, upon the object with which the instrument is employed. Thus if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand be not in, this is an entry. 1 *Hale, P. C.* 555; *Hawk. P. C. b.* 1, *c.* 38, *s.* 11; 2 *East, P. C.* 490.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be such an entry as to constitute burglary. Thus where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found inside the house by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, the entry was ruled to be incomplete. *Hughes's case*, 2 *East, P C.* 491; 1 *Leach*, 406; *Hawk. P. C. b.* 1, *c.* 38, *s.* 12. A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a case reserved, the judges were of opinion that this was not burglary,

there being no proof that any part of the prisoner's hand was within the window. *Rust's case*, 1 *Moody, C. C.* 183.

Proof of entry—by firing a gun into the house.] It has been already stated, that if a man breaks a house and puts a pistol in at the window with intent to kill, this amounts to burglary. 1 *Hale, P. C.* 555, *ante*, p. 334. "But," says Lord Hale, "if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary—*quære*." Hawkins, however, states, that the discharging a loaded gun into a house is such an entry as will constitute burglary; *Hawk. P. C. b.* 1, *c.* 38, *s.* 11; and this opinion has been followed by Mr. East and Mr. Serjt. Russell. "It seems difficult," says the former, "to make a distinction between this kind of implied entry, and that by means of an instrument introduced between the window or threshold for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is held in the hand, and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony." 2 *East, P. C.* 490; 1 *Russ. by Grea.* 795. It was ruled by Lord Ellenborough, that a man who from the outside of a field discharged a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. *Pickering* v. *Rudd*, 4 *Campb.* 220; 1 *Stark.* 58.

Proof of entry—constructive entry—by one of several.] It is not necessary in all cases to show an actual entry by all the prisoners; there may be a constructive *entry* as well as a constructive *breaking*. A. B. and C. come in the night by consent to break and enter the house of D. to commit a felony; A. only actually breaks and enters the house. B. stands near the door, but does not actually enter, C. stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals. 1 *Hale, P. C.* 555. So where a man puts a child of tender years in at the window of the house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infan[illegible] And so if the wife, in the presence of the husband, by his t[illegible] coercion break and enter a house in the night, this is burgl[illegible] husband, though the wife, the immediate actor, is excused [illegible] cion of her husband. *Id.* 556; and see *Jordan's case, ant*[illegible]

Proof of the premises being a mansion-house.] It must be [illegible] that the premises broken and entered were either a mansion-h[illegible] parcel of a mansion-house. Every house for the dwelling and h[illegible]tion of man is taken to be a mansion-house, wherein burglary m[illegible] committed. 3 *Inst.* 64-5; 2 *East, P. C.* 491.

A mere tent or booth erected in a market or fair is not a dwelling-house for the purpose of burglary. 1 *Hale, P. C.* 557; 4 *Bl. Com.* 225. But where the building was a permanent one of mud and brick on the down at Weyhill, erected only as a booth for the purposes of a fair for a few days in the year, having wooden doors and windows bolted inside, it was held that as the prosecutor and his wife slept there every night of the fair (during one of which it was broken and

entered), this was a dwelling-house. *Smith's case, coram Park, J.*, 1 *Moody & Robinson*, 256.

The following cases were decided previous to the 7 & 8 Geo. 4, c. 29, s. 13, which has prescribed what shall be considered a dwelling-house for the purpose of burglary.

The mere fact of a building in the neighbourhood of a dwelling-house being occupied together with the dwelling-house, by the same tenant (not taking into consideration the question of the building being within the same curtilage, as to which, *vide post*,) will not render the former building a *dwelling-house* in point of law. The prisoner broke and entered an outhouse in the possession of G. S., and occupied by him with his dwelling-house, but not connected therewith by any fence inclosing both. The judges held that the prisoner was improperly convicted of burglary. The outhouse being separated from the dwelling-house, and not within the same curtilage, was not protected by the bare fact of its being occupied with it at the same time. *Garland's case*, 2 *East, P. C.* 403. So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure; upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the houses adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. *Eggington's case*, 2 *East, P C.* 494. The house of the prosecutor was in High-street, Epsom. There were two or three houses there, insulated like Middle-row, Holborn. At the back of the houses was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz. a kitchen, a coach-house, a larder, and a brewhouse. Over the brewhouse a servant-boy always slept, but no one else; and in this room the offence was committed. There was no communication between the dwelling-house and these buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the judges were [illegible]on that the room in question was not parcel of the dwelling-[illegible] which the prosecutor dwelt, because it did not adjoin to it, was [illegible] the same roof, and had no common fence. Graham, B., [illegible]being of opinion that it was parcel of the house. But all [illegible]s present thought that it was a distinct dwelling of the [illegible]or. *Westwood's case*, *Russ. & Ry.* 495.

[illegible]*iggs's case*, 2 *C. & K.* 322, (decided since the statute,) it [illegible]d that adjoining to the prosecutor's dwelling-house was a [illegible] one end of which was supported by the end wall of the dwelling-[illegible], and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy, were of different heights. Wilde, C. J., held that the dairy was not part of the dwelling-house. In the following case, however, the building, though not within the curtilage, and having no internal communication, was held to constitute part of the dwelling-house. The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage,

a cow-house, and barn, all in one range of buildings, in the order mentioned, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be a burglary, for the barn, which was under the same roof, was parcel of, and enjoyed with, the dwelling-house. *G. Brown's case*, 2 *East*, *P. C.* 493. So where the premises, broken and entered, were not within the same external fence as the dwelling-house, nor had they any internal communication with it, yet they were held to be part of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the workshops and the dwelling-house, nor were they surrounded by any external fence. Upon a case reserved, the judges were unanimously of opinion, that the workshops were parcel of the dwelling-house. *Chalking's case*, *Russ. & Ry.* 334; see also *Lithgo's case*, *Id.* 357. In the case about to be mentioned, the premises broken and entered were within the curtilage, but without any internal communication with the dwelling-house. It does not appear whether the decision proceeded upon the same ground as the last case, or whether on the ground that the building in question was within the curtilage. The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other (within the common inclosures) being through an open passage into the factory passage, which communicated with a lumber-room in the factory, from which there was a staircase which led into the yarn-room, where the felony was committed. On a case reserved, all the judges held, that the room in question was properly described as the dwelling-house of the prosecutor. *Hancock's case*, *Russ. & Ry.* 171. See also *Clayburn's case*, *Id.* 360.

Proof of the premises being a mansion-house—occupation.] It must appear that the premises in question were, at the time of the offence, occupied as a *dwelling-house*. Therefore, where a house was under repair, and the tenant had not entered into possession, but had deposited some of his goods there, but no one slept in it, it was held not to be a mansion-house, so as to make the breaking and entering a burglary. *Lyon's case*, 1 *Leach*, 185; 2 *East*, *P. C.* 497. Nor will the circumstances of the prosecutor having procured a person to sleep in the house (not being one of his own family) for its protection, make any difference. Thus where a house was newly built and finished in every respect, except the painting, glazing, and flooring of one garret, and a workman, who was constantly employed by the prosecutor, slept in it for the purpose of protecting it, but no part of the prosecutor's domestic family had taken possession, it was held at the Old Bailey, on the authority of *Lyon's case* (*supra*), that it was not the dwelling-house of the prosecutor. *Fuller's case*, 1 *Leach*, 186 (*n*). So where the prosecutor took a house, and deposited some of his goods in it, and not having slept there himself, procured two persons (not his own servants) to sleep there for the purpose of protecting the goods, it was held at the Old Bailey, that as the prosecutor had only in fact taken possession of the house so far as to deposit certain articles of his trade

therein, but had neither slept in it himself, nor had any of his servants, it could not in contemplation of law be called his *dwelling-house. Harris's case*, 2 *Leach*, 701; 2 *East, P. C.* 498. See also *Hallard's case, coram Buller, J.*, 2 *Leach*, 701 (*n*). *Norrey Thompson's case*, 2 *Leach*, 771. The following case, decided upon the construction of the statute 12 Anne, c. 7, is also an authority on the subject of burglary: The prosecutor, a publican, had shut up his house, which in the day-time was totally uninhabited, but at the night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor, that he had no intention whatever to reside in the house, either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. *Davies, alias Silk's case*, 2 *Leach*, 876; 2 *East, P. C.* 499.

Where no person sleeps in the house, it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlour, with a staircase to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother who lived next door. Every morning he went to his shop, transacted his business, dined, and stayed the whole day there, considering it as his home. When he first bought the house he had a tenant, who quitted it soon afterwards, and from that time no person had slept in it. On a case reserved, all the judges held, that this was not a dwelling-house. *Martin's case, Russ. & Ry.* 108. It seems to be sufficient if any part of the owner's family, as his domestic servants, sleep in the house. A. died in his house. B. his executor put servants into it, who lodged in it, and were at board wages, but B. never lodged there himself. Upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court inclined to think that it might, *because the servants lived there*; but upon the evidence there appeared no breach of the house. *Jones's case*, 2 *East, P. C.* 499.

Proof of the premises being a dwelling-house—occupation—temporary or permanent.] A house is no less a dwelling-house, because at certain periods the occupier quits it, or quits it for a temporary purpose. "If A.," says Lord Hale, "has a dwelling-house, and he and all his family are absent a night or more, and in their absence, in the night, a thief breaks and enters the house to commit felony, this is burglary." 1 *Hale, P. C.* 556; 3 *Inst.* 64. So if A. have two mansion-houses, and is sometimes with his family in one, and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. *Id.* 4 *Rep.* 40, *a.* Again, if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. *Evans and Finche's case, Cro. Car.* 473; 1 *Hale, P. C.* 556. The prosecutor being possessed of a house in Westminster in which he dwelt, took a journey into Cornwall, with intent to return and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open, and robbed. He returned a month after with his family, and

inhabited there. This was adjudged burglary, by Holt, C. J., Treby, J., and four other judges. *Murry's case*, 2 *East*, *P. C.* 496; *Foster*, 77.

In these cases the owner must have quitted his house *animo revertendi*, in order to have it still considered as his mansion, if neither he nor any part of his family were in it at the time of the breaking and entering. 2 *East*, *P. C.* 496. The prosecutor had a house at Hackney, which he made use of in the summer, his chief residence being in London. About the latter end of the summer he removed to his town house, bringing away a considerable part of his goods. The following November his house at Hackney was broken open, upon which he removed the remainder of his furniture, except a few articles of little value. Being asked whether at this time he had any intention of returning to reside, he said he had not come to any settled resolution, whether to return or not, but was rather inclined totally to quit the house and let it. The burglary happened in the January following, but the court (at the Old Bailey) were of opinion, that the prosecutor having left his house and disfurnished it, without any settled resolution to return, but rather inclining to the contrary, it could not be deemed his dwelling-house. *Nutbrown's case*, *Foster*, 77; 2 *East*, *P. C.* 496. See *R.* v. *Flannagan*, *Russ. & Ry.* 187.

It seems that the mere casual use of a tenement, as a lodging, or only upon some particular occasion, will not constitute it a dwelling-house. 2 *East*, *P. C.* 497. Where some corn had been missed out of a barn, the prosecutor's servant and another person put a bed in the barn, and slept there, and upon the fourth night the prisoner broke and entered the barn; upon a reference it was agreed by all the judges, that this sleeping in the barn made no difference. *Brown's case*, 2 *East*, *P. C.* 497. So a porter lying in a warehouse, *to watch goods*, which is solely for a particular purpose, does not make it a dwelling-house. *Smith's case*, 2 *East*, *P. C.* 497.

As to a wrongful occupation, see *Wallis's case*, *ante*, p. 271.

Proof of the premises being a dwelling-house—occupation—house divided, without internal communication, and occupied by several.] Where there is an actual severance in fact of the house, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, the part so separately occupied is the dwelling-house of the person living in it, provided he dwell there. If A. lets a shop, parcel of his dwelling-house, to B. for a year, and B. holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A., for it was severed by the lease during the term; but if B. or his servant sometimes lodge in the shop, it is the mansion-house of B., and burglary may be committed in it. 1 *Hale*, *P. C.* 557; *Vide Sefton's case*, *infra*. The prosecutors, Thomas Smith and John Knowles, were in partnership, and lived next door to each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners, and were now perfectly distinct, there being no communication from one to the other, without going into the street. The housekeeping, servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of the prosecutor Smith. On the trial, before Eyre, C. B., and Gould, J., at the Old Bailey, it was objected that the burglary ought

to have been laid to be in the dwelling-house of the prosecutor Smith only; and of this opinion was the court. *Martha Jones's case*, 1 *Leach*, 537; 2 *East*, *P. C.* 504. But it is otherwise where there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. But it was thought to be a case of much nicety. *Sefton's case*, 1 *Russ. by Grea.* 799; *Russ. & Ry.* 203. Chambers in the inns of court are to all purposes considered as distinct dwelling-houses, and therefore whether the owner happens to enter at the same outer door or not, will make no manner of difference. The sets are often held under distinct titles, and are, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. 2 *East*, *P. C.* 505; 1 *Hale*, *P. C.* 556.

Proof of the premises being a dwelling-house—occupation—house divided, without internal communication, but all occupied by the same person.] We have seen (*supra*), that where a house is divided, and there is no internal communication between the two parts, which are occupied by separate tenants, each part is to be considered as the dwelling-house of the tenant living in it. But where a house is thus severed, and the owner dwells in one part of it only, and the other part is broken and entered in the night; whether this shall be deemed a burglary seems a question of much nicety. According to the authorities, before the statute, 7 & 8 Geo. 4, c. 29, s. 13 (see *post*, p. 349), it was held to be burglary. In the following case, the severed part of the premises had been let to another person, but that circumstance was held to make no difference, and the tenant of the other part was held to be the tenant of the whole, there being the same outer door: The prosecutor was the owner of a house, in which he resided, and to which house there was a shop adjoining, built close to the house. There was no internal communication between the house and the shop, the only door of the latter being in the court-yard before the house, which yard was inclosed by a brick wall, including the house and shop. The prosecutor let the shop, together with some apartments in the house, to one Hill, from year to year. There was only one common door to the house, which communicated as well to the prosecutor's as to Hill's apartments. The burglary was committed in the shop. On a case reserved, the judges were all of opinion, that the shop was rightly laid to be the dwelling-house of the prosecutor, who inhabited one part, there being but one outer door, especially as it was within one curtilage, or fence; and that the shop, being let with a part of the house inhabited by Hill, still continued to be a part of the dwelling-house of the prosecutor, though there was no internal communication between them. But it was admitted, that if the shop had been let by itself, Hill not dwelling therein, burglary could not have been committed in it, for then it would have been severed from the house. *Gibson's case*, 2 *East*, *P. C.* 508. This decision was acted upon by Holroyd, J., in the following case: The prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not com-

municate with the loft in any manner. On the side of the house was a shop, which was not used as a dwelling-house, and which did not communicate with the four chambers. Between this shop and the loft there was a communication, by means of a ladder. The dwelling-house and the shop both opened into the same fold. Holroyd, J., on the authority of *Gibson's case, supra*, held the loft to be a dwelling-house. *Thompson's case*, 1 *Lewin, C. C.* 32. It does not clearly appear in *Gibson's case*, whether the shop was considered to be part of the dwelling-house, strictly speaking (in the same manner as if it had been any of the other apartments), or whether it was only taken to be part of the dwelling-house as being within the same curtilage or fence, the judges using the expression, "especially as it was within one curtilage or fence." If it was decided upon the latter ground, it would now, since the 7 & 8 Geo. 4, c. 29, s. 13, be a question how far the shop would be considered a part of the dwelling-house, there being no communication between the two. According to the case of *Burrowes*, 1 *Moody, C. C.* 274, *post*, p. 349, in which the judges were divided, seven to five, the shop would still be considered as part of the dwelling-house.

Proof of the premises being a dwelling-house occupation—where there is an internal communication, but the parts are occupied by several under different titles.] Although in the case of lodgers and inmates, who hold under one general occupier, the whole of the house continues to be his dwelling-house, if there be an internal communication, and the parties have a common entrance, *vide infra*, yet it is otherwise where several parts of a building are let under distinct leases. The owner of a dwelling-house and warehouse under the same roof, and communicating internally, let the house to A. (who lived there), and the warehouse to A. and B., who were partners. The communication between the house and warehouse was constantly used by A. The offence was committed in the warehouse, which was laid to be the dwelling-house of A. On a case reserved, the judges were of opinion that this was wrong, A. holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and B. *Jenkins's case, Russ. & Ry.* 244.

Proof of the premises being a dwelling-house—occupation—by lodgers.] Where separate apartments were let in a dwelling-house to lodgers, it seems formerly to have been doubted whether they might not in all cases be described as the mansion-house of the lodgers. 2 *East, P. C.* 505; *Hawk. P. C. b.* 1, *c.* 38 *ss.* 13, 14. But the rule is now taken to be, according to the opinion of *Kelynge* (p. 84), that if the owner, who lets out apartments in his house to other persons, sleeps under the same roof, and has but one outer-door common to himself and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and his lodgers enter by different outer doors, the apartments so let are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt, C. J., at the Old Bailey, in 1701, although in that case the rooms were let for a year, under a rent, and Tanner, an ancient clerk in court, said that this was the constant course and practice. 2 *East, P. C.* 505, 1 *Leach*, 90 (*n*). Where one of two partners is the lessee of a shop and house, and the

other partner occupies a room in the house, he is only regarded as a lodger. Morland and Gutteridge were partners; Morland was the lessee of the whole premises, and paid all the rent and taxes for the same. Gutteridge had an apartment in the house, and allowed Morland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The burglary was committed in the shop, which was held to be the dwelling-house of Morland, and the judges held the description right. *Parmenter's case*, 1 *Leach*, 537 (*n*). In the following cases, the apartments of the lodger were held to be his dwelling-house: The owner let the whole of a house to different lodgers. The prosecutor rented the first floor, a shop and a parlour on the ground floor, and a cellar underneath the shop, at 12*l*. 10*s*. a-year. The owner took back the cellar to keep lumber in, for which he allowed a rebate of 40*s*. a-year. The entrance was into a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlour, and beyond the parlour was the staircase which led to the upper apartments. The shop and parlour doors were broken open, and the judges determined, that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before mentioned. *Rogers's case*, 1 *Leach*, 89, 428; 2 *East*, *P. C.* 506, 507; *Hawk. P. C. b.* 1, *c.* 38, *s.* 29.

The house in which the offence was committed belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week. John Jordan, the prosecutor, had two rooms, viz., a sleeping-room, and a workshop in the garret, which he rented by the week as tenant at will to Nash. The workshop was broken and entered by the prisoner. Ten judges, on a case reserved, were unanimously of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment properly charged it to be the dwelling-house of Jordan. *Carrell's case*, 1 *Leach*, 237, 429; 2 *East*, *P. C.* 506. The prisoner was indicted under the 3 and 4 Wm. and M. c. 9, s. 1, for breaking and entering a dwelling-house, and stealing therein. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. (whose dwelling-house it was laid to be) rented a parlour on the ground-floor, and a single room up one pair of stairs, where he slept. The judges were of opinion, that the indictment rightly charged the room to be the dwelling-house of J. L. *Trapshaw's case*, 1 *Leach*, 427; 2 *East*, *P. C.* 506, 780.

It follows from the principle of the above cases, that if a man lets out part of his house to lodgers, and continues to inhabit the rest himself, if he breaks open the apartment of a lodger, and steals his goods, it is felony only, and not a burglary; for it cannot be burglary to break open his own house. 2 *East*, *P. C.* 506; *Kel.* 84.

Proof of the premises being a dwelling-house—occupation—by wife or family.] The actual occupation of the premises by any part of the prosecutor's domestic family, will be evidence of its being his dwelling-house. The wife of the prosecutor had for many years lived separate from her husband. When she was about to take the house in which the offence was afterwards committed, the lease was prepared in her husband's name; but he refused to execute it, saying he

would have nothing to do with it; in consequence of which, she agreed with the landlord herself, and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid to be the dwelling-house of the husband. *Farre's case*, *Kel.* 43, 44, 45. in a similar case, where there was the additional fact, that the wife had a separate property vested in trustees, the judges were clear that the house was properly laid to be the dwelling-house of the husband. It was the dwelling-house of some one. It was not the wife's; because, at law, she could have no property; it was not the trustees', because they had nothing to do with it; it could then only be the husband's. *French's case*, *Russ. & Ry.* 491. So where the owner of a house, who had never lived in it, permitted his wife, on their separation, to reside there, and the wife lived there in adultery with another man, who paid the expenses of housekeeping, but neither rent nor taxes, this was held by the judges to be properly described as the dwelling-house of the husband. *Wilford's case*, *Russ. & Ry.* 517; and see *Smyth's case*, 5 *C. & P.* 203. Where a prisoner was indicted for breaking into the house of Elizabeth A., and it appeared that her husband had been convicted of felony, and was in prison under his sentence when the house was broken into, it was held on a case reserved, that the house was improperly described, although the wife continued in possession of it. *Whitehead's case*, 9 *C. & P.* 429. But if a case should arise, in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband. 2 *East, P. C.* c. 15, s. 16; 1 *Russ. by Grea.* 808.

Proof of the premises being a dwelling-house—occupation—by clerks and agents in public offices, companies, &c.] An agent or clerk employed in a public office, or by persons in trade, is in law the servant of those parties, and if he be suffered to reside upon the premises, which belong to the government, or to the individuals employing him, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking into the lodgings of Sir Henry Hungate, at Whitehall, and the judges were of opinion, that it should have been laid to be the King's mansion-house at Whitehall. *Williams's case*, 1 *Hale, P. C.* 522, 527. The prisoner was indicted for breaking into a chamber in Somerset-house, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the Queen-mother. *Burgess's case*, *Kel.* 27. The prisoner was indicted under the 12 Anne, c. 7, for stealing a gold watch in the dwelling-house of W. H. Bunbury, Esq. The house was the invalid office at Chelsea; an office under government. The ground-floor was used by the paymaster-general, for the purpose of conducting the business relating to the office. Mr. Bunbury occupied the whole of the upper part of it; but the rent and taxes of the whole were paid by government. The court (at the Old Bailey) held, that it was not the dwelling-house of Mr. Bunbury. *Peyton's case*, 1 *Leach*, 324; 2 *East, P. C.* 501. The prisoner was indicted for burglary in the mansion-house of Samuel Story. It appeared that the house belonged to the African Company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there: but Holt, C. J., Tracy, J., and Bury, B., held this to be the mansion-house of the company, for though an aggregate

corporation cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants. *Hawkins's case*, 2 *East*, *P. C.* 501; *Foster*, 38. So it was held with regard to the dwelling-house of the East India Company, inhabited by their servants. *Picket's case*, 2 *East*, *P. C.* 501. The prisoner was indicted for breaking and entering the house of the master, fellow, and scholars of Benne't College, Cambridge. The fact was he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. *Maynard's case*, 2 *East*, *P. C.* 501. The governor of the Birmingham workhouse was appointed under contract for seven years, and had the chief part of the house for his own occupation; but the guardians and overseers who appointed him, reserved to themselves the use of one room for an office, and of three others for store-rooms. The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but upon a case reserved, the judges held the description wrong. *Wilson's case*, *Russ. & Ry.* 115. So a club-house is wrongly described as the dwelling-house of the house-steward who sleeps in the club-house, and has the charge of, and is responsible for the plate in it. *Ashley's case*, 1 *C. K.* 198.

The following case appears to be at variance with previous authorities, and it may be doubted whether it is to be considered as law: The prosecutor, Sylvester, kept a blanket warehouse in Goswell-street, and resided with his family in the house over the warehouse, which was on the ground-floor, and consisted of four rooms, the second of which was the room broken open. There was an internal door between the warehouse and the dwelling-house. The blankets were the property of a company of blanket manufacturers at Witney, in Oxfordshire, none of whom ever slept in the house. The whole rent, both of the dwelling-house and warehouse, was paid by the company, to whom Sylvester acted as servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. The lease of the premises was in the company. The court (Graham, B., and Grose, J.) were clearly of opinion, that it was rightly charged to be the dwelling-house of Sylvester; for though the lease of the house was held, and the whole rent reserved paid by the company in the country, yet, as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense to consider it as their dwelling-house, especially, as it was evident that the only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. It was the means by which they in part remunerated Sylvester for his agency, and was precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain, however, the court observed, took another shape. The company preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein towards the salary which he was to receive from them. It was, therefore, essentially and truly, the dwelling of the person who occupied it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; but it would be absurd to suppose that that terror which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney. *Margett's case*, 2 *Leach* 930.

It has been observed, that the accuracy of the reason given in the above judgment with regard to protecting the actual occupant, may, perhaps, be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror to the East India Company or the African Company, in the cases of burglary in their houses. In the course of this case, Mr. Justice Grose inquired if there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and Mr. Knapp informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall, which was broken open, and in that case the court held it to be his father's house. 2 *Leach*, 931 (*n*). *Margett's case*, however, appears to be supported by a more recent decision. The prosecutor was secretary to the Norwich Union Insurance Company, and lived with his family in the house used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. The recorder, on the authority of *Margett's case*, and the case of the clerk of the Haberdashers' Company there mentioned, thought the indictment correct, but reserved the point for the judges, who were of opinion that the house was rightly described as the prosecutor's, since he, his family, and servants were the only persons who dwelt there; and they only were liable to be disturbed by a burglary. Though their lordships would not say that it might not have been described as the company's house, they thought it might, with equal propriety, be described as the prosecutor's. *Witt's case*, 1 *Moody*, *C. C.* 248.

Proof of the premises being a dwelling-house—occupation—by servants occupying as such.] Where a servant occupies a dwelling-house, or apartments therein, as a *servant*, his occupation is that of his master, and the house is the dwelling-house of the latter. But it is otherwise, where the servant occupies *suo jure* as tenant. Thus apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, can only be described as the dwelling-house of the king or noblemen. *Kel.* 27; 1 *Hale*, *P. C.* 522, 527. Graydon, a farmer, had a dwelling-house and cottage under the same roof, but they were not enclosed by any wall or court-yard, and had no internal communication. Trumball, a servant of Graydon, and his family, resided in the cottage by agreement with Graydon when he entered his service. He paid no rent, but an abatement was made in his wages on account of the cottage. The judges (*Buller dub.*) held, that this was no more than a licence to Trumball to lodge in the cottage, and did not make it his dwelling-house. *Brown's case*, *East*, 2 *P. C.* 501.

The prosecutors were partners as bankers, and also as brewers, and were the owners of the house in question, used in both concerns. There were three rooms with only one entrance by a door from the street. No one slept in these rooms. The upper rooms of the house were inhabited by John Stevenson, the cooper employed in the brewing concern. He was paid half a guinea a-week, and permitted to have these rooms for the use of himself and family. There was a

separate entrance from the street to these rooms. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with Stevenson) and ladder, not locked or fastened, and not used. Stevenson was assessed to the window-tax for his part of the premises, but the tax was paid by his masters. It being objected, that the place where the burglary was committed was not the dwelling-house of the prosecutors, the point was reserved, when eight of the judges thought that Stevenson was not a tenant, but inhabited only in the course of his service. Four of the judges were of a contrary opinion. Lord Ellenborough, C. J., said—"Stevenson certainly could not have maintained trespass against his employers if they had entered these rooms without his consent. Does a gentleman who assigns to his coachman the rooms over his stables, thereby make him a tenant? The act of the assessors, whether right or wrong in assessing Stevenson for the windows of the upper rooms, can make no difference, nor is it material which of the two trades the prosecutors carried on, Stevenson was servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened, and it can make no difference whether the communication between the upper and lower rooms was through a trap-door or by a common staircase." *Rex.* v. *Stockton and Edwards*, 2 *Leach*, 1015; 2 *Taunt.* 339; *S. C. under the name of R.* v. *Stock and another*, 1 *Russ. & Ry.* 185. See 1 *Russ. by Grea.* 809; *Flannagan's case*, *Russ. & Ry.* 187, *infra.*

In order to render the occupation of a servant the occupation of the master, it must appear that the servant is, properly speaking, such, and not merely a person put into the house for the purpose of protecting it. The prosecutor left the dwelling-house, keeping it only as a warehouse and workshop, without any intention of again residing in it. In consequence of his thinking it not prudent to leave the house without some one in it, two women, employed by him as work-women in his business, and not as domestic servants, slept there to take care of the house, but did not take their meals there or use the house for any other purpose than that of sleeping there. Upon an indictment for stealing goods to the amount of more than 40*s.*, in the dwelling-house of the prosecutor, the judges held, that this could not be considered his dwelling-house. *Flannagan's case*, *Russ. & Ry.* 187. It is difficult to distinguish this case from that of *R.* v. *Stockton*, 2 *Leach*, 1015, *supra*, which received an opposite decision. Still, though the object of the owner of the house in putting in his servants be to protect his property only, yet if *they live there*, their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left the dwelling-house and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought, that putting in a servant and his family *to live*, was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. *Gibbon's case*, 1 *Russ. by Grea.* 806. J. B. worked for one W., who did carpenter's work for a public company, and had put J. B. into the house in question to take care of it and of some mills adjoining, J. B. receiving no more wages after than before he went to live in the house; it was

held, that the house was not rightly described as the house of J. B. *Rawlins's case*, 7 *C. & P.* 150. See *Ashley's case*, 1 *C. & K.* 198, *ante*, p. 344.

Proof of the premises being a dwelling-house—occupation—by servants—as tenants.] Where a servant occupies part of the premises belonging to his master, not as in the cases above-mentioned, *ante*, p. 345, in the capacity of *servant*, but in the character of tenant, the premises must be described as his dwelling-house. Greaves and Co. had a house and building where they carried on their trade. Mottran, their warehouseman, lived with his family in the house, and paid 11*l.* per annum for rent and coals (the house alone being worth 20*l.* per annum). Greaves and Co. paid the rent and taxes. The judges were of opinion, that this could not be laid to be the dwelling-house of Greaves and Co. They thought that as Mottran stood in the character of tenant (for Greaves and Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), Mottran's occupation could not be deemed their occupation. *Jarvis's case*, 1 *Moody, C. C.* 7.

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent, if, from other circumstances of the case, it appears that he holds as tenant. The prosecutor (Gent), a collier, resided in a cottage built by the owner of the colliery for whom he worked. He received 15*s.* a-week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling-house of the prosecutor, Holroyd, J., was of opinion, that though the occupation and enjoyment of the cottage were obtained by reason of Gent being the servant of the owner, and co-extensive only with the hiring, yet that his inhabiting the cottage was not, as in the cases referred to (2 *East, P. C.* 500), correctly speaking, merely as the servant of the owner, nor was it either as to the whole or any part of the cottage, as his (the owner's) occupation, or for his use or business, or that of the colliery, but wholly for the use and benefit of Gent himself and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might in law, at the master's election, be considered as the occupation of the master and not of the servant, yet with regard to third persons it might be considered either as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage might be described as the dwelling-house of Gent. *Jobling's case, Russ. & Ry.* 525. A toll-house was occupied by a person employed by the lessee of the tolls at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion, that the toll-house was rightly described as his dwelling-house; for he had the exclusive possession of it, and it was unconnected with any premises of the lessee, who did not appear to have any interest in it. *Camfield's case*, 1 *Moody, C. C.* 43. So where a person who has been servant remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be described as his dwelling-house. Lord Spencer let a house to Mr. Stephens, who underlet it. The sub-lessee failed and quitted, and no one remained in the house but Ann Pemberton, who had been servant to the sub-lessee. Stephens paid her 15*s.* a-week till he died, when she received no payment, but continued in the house. At Michaelmas it was given up to Lord Spencer, but Ann Pemberton was permitted by the steward

to remain in it. Bayley, J., thought Ann Pemberton might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid in the indictment as the dwelling-house of Ann Pemberton, as she was there, not as a servant, but as a tenant at will. *Collet's case, Russ. & Ry.* 498. Where a gardener lived in a house of his master, quite separate from the dwelling-house of the latter, and had the entire control of the house he lived in and kept the key, it was held that it might be laid either as his or as his master's house. *Rees's case*, 7 *C. & P.* 568.

Proof of the premises being a dwelling-house—occupation—by guests, &c.] If several persons dwell in one house, as guests or otherwise, having no fixed or certain interest in any part of the house, and a burglary be committed in any of their apartments, it seems clear that the indictment ought to lay the offence in the mansion-house of the proprietor. *Hawk. P. C. b.* 1, *c.* 38, *s.* 26. Therefore, where the chamber of a guest at an inn is broken open, it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest. 1 *Hale, P. C.* 557. It has been said, that if the host of an inn break the chamber of his guest in the night to rob, this is burglary. *Dalton, c.* 151, *s.* 4. But it has been observed that this may be justly questioned; for that there seems no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which, Kelynge says, cannot be burglary. *Kel.* 84; 2 *East, P. C.* 582. It is said by Lord Hale, that if A. be a lodger in an inn, and in the night opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be burglary; "and," he continues, "it seems not, because he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, it had been burglary." 1 *Hale, P. C.* 554. It has been observed, that the reasoning in the following case is opposed to the distinction taken by Lord Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, falls under the same consideration as a servant under the like circumstances. 2 *East, P. C.* 503. The prosecutor, a jew pedlar, came to the house of one Lewis, a publican, to stay all night, and fastened the door of his chamber. The prisoner pretended to Lewis that the prosecutor had stolen his goods, and under this pretence, with the assistance of Lewis and others, forced the chamber-door open, and stole the prosecutor's goods; Adams, B., doubted whether the chamber could be properly called the dwelling-house of the prosecutor, being really a part of the dwelling-house of the innkeeper. Upon a case reserved, the judges all thought, that though the prosecutor had for that night a special interest in the bedchamber, yet it was merely for a particular purpose, viz., to sleep there that night as a travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself; but both the property and possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in the room, even for the goods now in question, which he could not be, unless that room were deemed to be in his possession; and that the landlord might go into the room when he pleased, and would not be a trespasser to his guest. *Prosser's case*, 2 *East, P. C.* 562.

Proof of the premises being a dwelling-house—occupation—partners.] Where one of several partners is the lessee of the premises where the business is carried on, and another partner occupies an apartment there and pays for his board and lodging, the latter, as already stated, will be considered as a lodger only. *Parmenter's case*, 1 *Leach*, 537 (*n*), *ante*, p. 342. But where the house is the joint property of the firm, and one of the partners, and the persons employed in the trade, live there, it is properly described as the dwelling-house of the firm. *Athea's case*, 1 *Moody*, *C. C.* 329.

Proof of the premises being a dwelling-house—out-buildings, and curtilage.] It has been already stated, that the dwelling-house at common law, not only included the premises actually used as such, but also such out-buildings, &c., as were within the curtilage or court-yard surrounding the house, and were consequently considered to be under the same protection. *Ante*, p. 336.

Great difficulty being frequently experienced in deciding what buildings came within this protection, and very nice distinctions having been taken on the subject (see the cases collected, 2 *East*, *P. C.* 492; 1 *Russ. by Grea.* 790), to remedy this evil it was enacted, by the 7 & 8 Geo. 4, c. 29, s. 13 (and with regard to Ireland, by the 9 Geo. 4, c. 55, s. 13), that "no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary (or for any of the purposes aforesaid), unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

The following cases have been decided on this clause: The prosecutor's house consisted of two long rooms, another room used as a cellar, and washhouse on the ground floor, and three bedrooms up stairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. The prisoner broke into the washhouse, and the question reserved for the opinion of the judges was, whether this was burglary. Seven of their lordships thought that the washhouse was part of the dwelling-house, the remaining five thought it was not. *Burrowes's case*, 1 *Moody*. *C. C.* 274.

In the above case, the washhouse was under the same roof with the dwelling-house, which distinguishes it from the following:

Behind the dwelling-house there was a pantry; to get to the pantry from the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, on the left hand, was the door of the pantry. When the passage door was shut, the pantry-door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry-door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a "tea-fall," and leaned against the wall of an inner pantry, in which there was a latchet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. The prisoner entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth

nailed to the window-frame. Taunton, J., held that the outer pantry was not part of the dwelling-house within the above clause, and consequently that no burglary had been committed. *Somerville's case*, 2 *Lew. C. C.* 113. See also *Turner's case*, 6 *C. & P.* 407; and *Higgs's case*, *ante*, p. 337.

Proof of the parish—the local description.] If it be not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the placed named in the indictment by way of special venue. *R.* v. *Napper*, 1 *Moo. C. C.* 44. And if two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. *R.* v. *Richards*, 1 *Moo. & R.* 177. Where an indictment for burglary charged that the prisoners, "late of Norton juxta Kempsey in the county of Worcester," "at Norton juxta Kempsey aforesaid, the dwelling-house of T. Hooke, there situate," feloniously did break and enter, &c., and it appeared that Norton juxta Kempsey was a chapelry and perpetual curacy; it was objected that the indictment ought to have stated Norton juxta Kempsey to be a chapelry, or described it in some other manner. But Patteson, J., held, that *R.* v. *Napper*, 1 *Moo. C. C.* 44, was a sufficient authority to show that this indictment was good. There it was held, that an indictment alleging that the prisoner "at Liverpool," did break and enter a dwelling-house "there situate," was good; and there was no reason why an indictment alleging a burglary at "Norton juxta Kempsey" was not also good, it being proved that there was such a district. *R.* v. *Brookes and others*, 1 *Russ. by Grea.*, *Addenda*, xvi.; *S. C. Carr. & M.* 544. A variance between the description in the indictment and the evidence is amendable, under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 107.

Proof of the offence having been committed in the night-time.] The prosecutor must prove that both the breaking and entering took place in the night-time, but it is not necessary that both should have taken place on the same night. It is said by Lord Hale, that if thieves break a hole in the house one night, to the intent to enter another night, and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 *Hale, P. C.* 551. This point was decided in the following case: During the night of Friday, the side-door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night, the prisoner entered through the hole thus made. On a case reserved, the judges were of opinion, that the offence amounted to a burglary, the breaking and entering being both by night. And although a day elapsed between the breaking and entering, yet the breaking was originally with intent to enter. *John Smith's case, Russ. & Ry.* 417. See also *Jordan's case*, *ante*, p. 332.

With regard to what shall be esteemed *night*, it is said by Lord Hale to have been anciently held, that after sunset, though daylight be not quite gone, or before sun-rising, is *noctanter*, to make a burglary (*Dalt. c.* 99; *Cromp.* 32, *b.*); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or *crepusculum*, it is

not night. 1 *Hale, P. C.* 550; 3 *Inst.* 63. This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished. 1 *Hale*, 551; 4 *Bl. Com.* 224. Now by the 7 Wm. 4 and 1 Vict. c. 86 (E. & I.), s. 4, "so far as the same is essential to the crime of burglary, the night shall be considered, and is hereby declared, to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the succeeding day."

"If the breaking of the house," says Lord Hale, "were done in the day-time, and the entering in the night, or the breaking in the night and the entering in the day, that will not be burglary; for both make the offence, and both must be *noctanter*." 1 *Hale, P. C.* 551, citing *Cromp.* 33, *a. ex.* 8 *ed.* 2. Upon this, the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter in the night at a hole in the wall which was there before, it is no burglary; but it does not appear who made the hole." 1 *Hale, P. C.* 551 (*n*). It is observed by Mr. Serjeant Russell, that it is elsewhere given as a reason by Lord Hale, why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; and the learned writer adds, that "this reasoning, if applied to a breaking in the day-time and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering a burglary." 1 *Russ. by Grea.* 821; and see 2 *East, P. C.* 509. It would seem, however, to be carrying the presumption much farther than in the case put by Lord Hale; and it may well be doubted, whether, in such a case, the offence would be held to amount to burglary.

Proof of intent—to commit felony—felony at common law, or by statute.] The prosecutor must prove that the dwelling-house was broken and entered with intent to commit a felony therein. Evidence that a felony was actually committed, is evidence that the house was broken and entered with intent to commit that offence. 1 *Hale, P. C.* 560; 2 *East, P. C.* 514. It was at one time doubted, whether it was not essential that the felony intended to be committed should be a felony at common law. 1 *Hale, P. C.* 562; *Crompton*, 32; *Dalt. c.* 151, *s.* 5. But it appears to be now settled according to the modern authorities, that it makes no difference whether the offence intended be felony at common law, or by statute; and the reason given is, that whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law. *Hawk. P. C. b.* 1, *c.* 38, *s.* 38; *Gray's case*, *Str.* 481; 4 *Bl. Com.* 228; 2 *East, P. C.* 511; 1 *Russ. by Grea.* 824. If it appear that the intent of the party, in breaking and entering, was merely to commit a trespass, it is no burglary; as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 *Hale, P. C.* 561; 2 *East, P. C.* 509. Where a servant embezzled money entrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although

it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. *Bingley's case*, *Hawk. P. C. b.* 1 *c.* 38. *s.* 37, cited 2 *Leach*, 843, as *Dingley's case* ; 2 *East*, *P. C.* 510, *S. C.* as *Anon.* Where goods had been seized as contraband by an excise-officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them ; and upon a case reserved, all the judges were of opinion, that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavouring to get back the goods. *Knight and Roffey's case*, 2 *East*, *P. C.* 510. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made felony by statute 19 Geo. 2, c. 34, the chief baron and some of the other judges held it would have been burglary. But even in that case, some evidence must be given, on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for this purpose. 2 *East*, *P. C.* 510. The prisoner was indicted for breaking, &c., with intent to kill and destroy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore-legs, from which he died. Pratt, C. J., directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent its running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. *Dobb's case*, 2 *East*, *P. C.* 513. Two poachers went to the house of a gamekeeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, and it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan, B., directed an acquittal. *Anon. Matth. Dig. C. L.* 48. See *Holloway's case*, 5 *C. & P.* 524.

Proof of the intent—variance in the statement of.] The intent must be proved as laid. Thus, if it be laid with intent to commit one sort of felony, and it be proved that it was with intent to commit another, it is a fatal variance. 2 *East*, *P. C.* 514. But see now 14 & 15 Vict. c. 100, s. 1. *ante*, p. 107. Where the prisoner was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but only an intent to steal, it was held by Holt, C. J., that this ought to have been so laid, and he directed an acquittal. *Vandercomb's case*, 2 *East*, *P. C.* 514. The property in the goods which it is alleged were intended to be stolen, must be correctly laid: 1 *Russ. by Grea.* 825 (*n*). An indictment for burglary charged the prisoner with breaking, in the night-time, into the dwelling-house of E. B., with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B. It was proved that it was the house of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others. It was held, that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without

proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. *Reg.* v. *Clarke*, 1 *C. & K.* 421. A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M., that K. his brother-in-law had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it: it was held that M. was a bailee, and that the goods in the shop might properly be laid as his property. *Bird's case*, 9 *C. & P.* 44.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent; 1 *Hale*, *P. C.* 560; 2 *East. P. C.* 514; and in such case no evidence, except that of the committing of the offence, will be required to show the intention. It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony. 2 *East, P. C.* 514, 515.

The intent of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crow-bar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J., said, that it was for the jury to say, whether the prisoners went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that it was matter of observation that they had the opportunity, but did not commit the larceny, and he left it to the jury to say, whether, from all the circumstances, they could infer that or any other intent. *Anon.* 1 *Lewin, C. C.* 37.

Minor offence—larceny.] If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny, simple or compound, according to the circumstances of the case. Thus where the prisoner was charged with breaking and entering the house of the prosecutor, and stealing 60*l.* therein, and the jury found that he was not guilty of breaking and entering the house in the night, but that he was guilty of stealing the money in the dwelling-house; upon a case reserved, it was resolved by the judges after some doubt, that by this finding the prisoner was ousted of his clergy, for the indictment contained every charge necessary upon the 12 Ann. c. 7, viz., a stealing in a dwelling-house to the amount of 40*s.*, and the jury had found him guilty of that charge. *Withal's case*, 2 *East, P. C.* 517; 1 *Leach*, 88. In a similar case the verdict given by the jury was, "not guilty of burglary, but guilty of stealing above the value of 40*s.* in the dwelling-house," and the entry made by the officer was in the same words. On a case reserved, the judges held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the

prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "not guilty of the breaking and entering in the night, but guilty of the stealing," &c., as that was more distinct and correct; It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of manslaughter," or, "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing. The judges added, that the whole verdict must be taken together, and that the jury must not be made to say, that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge, or to appear to speak contradictory, by means of the officer's using a technical term, when the verdict is sensible and intelligent in itself. *Hungerford's case*, 2 *East, P. C.* 518.

It was formerly thought, that if several were jointly indicted for burglary and larceny, and no breaking and entering were proved against one, he could not be convicted of larceny and the others of burglary. *Turner's case*, 1 *Sid.* 171; 2 *East, P. C.* 519. But in a later case, where one prisoner pleaded guilty, and the other two were found guilty of the larceny only, the judges, on a case reserved, differed in opinion. Seven of them resolved, that judgment should be entered against all the three prisoners, against him who had pleaded guilty for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J., and Hullock, B., were of a different opinion, but Hullock thought that if a *nolle prosequi* were entered as to the burglary, judgment might be given against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. *Butterworth's case, Russ. & Ry.* 520.

Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of the supposed burglary, he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said: "The indictment charges the prisoner with burglariously breaking and entering the house *and* stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced, goes to connect the prisoners with an antecedent felony committed before *three* o'clock, at which time, it is clear, they had not entered the house. Having tried without effect to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said, that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present." *Vandercomb's case*, 2 *Leach*, 708.

Proof of breaking out of a dwelling-house.] It was formerly

doubted whether, where a man entered a dwelling-house in the night (without breaking) with intent to commit felony, and afterwards broke out of the same, or being there in the night committed a felony, and broke out, this amounted to burglary or not. 1 *Hale, P. C.* 554; *Clarke's case*, 2 *East, P. C.* 490; *Lord Bac. Elem.* 65; 1 *Russ. by Grea.* 792. It was, however, declared to be such by 12 Anne, c. 7, and that act being now repealed, it is declared by 7 & 8 Geo. 4, c. 29, s. 11 (the 9 Geo. 4, c. 55, I.), that if any person shall enter the dwelling house of another with intent to commit a felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary.

An indictment which stated in one count, that the prisoner "did break *to* get out," and in another that he "did break *and* get out," was held by Vaughan and Patteson, JJ., insufficient since the last mentioned statute, which uses the words "break out." *Crompton's case*, 7 *C. & P.* 139.

Where a lodger, in the prosecutor's house, got up in the night and unbolted the back-door, and went away with a jacket of the prosecutor's which he had stolen; he was convicted of burglary. In this case it was also held to be not the less a burglary, because the defendant was *lawfully* in the house as a lodger or as a guest at an inn. *Wheeldon's case*, 8 *C. & P.* 747.

Proof upon plea of autrefois acquit.] In considering the evidence upon the plea of *autrefois acquit* in burglary, some difficulty occurs from the complex nature of that offence, and from some contrariety in the decisions. The correct rule appears to be, that an acquittal upon an indictment for burglary in breaking and entering and *stealing goods*, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, *with intent to steal*, on the ground that the several offences described in the two indictments cannot be said to be the same. This rule was established in *Vandercomb's case*, where Buller, J., delivered the resolution of the judges, and after referring to 2 *Hawk. P. C.* c. 35, s. 3; *Fost.* 361, 362; *Rex* v. *Pedley*, 1 *Leach*, 242, concluded in these words: "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply these principles to the present case. The first indictment was for burglariously breaking and entering the house of Miss Neville, and *stealing* the goods mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of Miss Neville *with intent to steal*, which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad, and that the prisoners must take their trials upon the present indictment. *Vandercomb's case*, 2 *Leach*, 716; 2 *East, P. C.* 519; overruling *Turner's case*, *Kel.* 30, *and Jones and Bever's case*, *Id.* 52. See also the learned dissertation on the subject of *autrefois acquit* in 1 *Russ. by Grea.* 832. Where a prisoner was indicted for a simple burglary in the house of a person, for whose murder he had been acquitted, Parke, B., said, "The charge in the indictment did not

affect the life of the prisoner, as there was not an allegation that the burglary was accompanied by violence, and that if he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even assault, on the indictment for murder, on which he had been acquitted altogether, in my opinion that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment." *Gould's case*, 9 *C. & P.* 364.

Being found by night armed, &c., with intent to break into any house, &c.] The 14 & 15 Vict., c. 19, s. 1, enacts, that "if any person shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or if any person shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow-jack, bit, or other implement of housebreaking, or if any person shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony, or if any person shall be found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned with or without hard labour for any term not exceeding three years."

Sect. 2. "If any person shall be convicted of any such misdemeanor as aforesaid committed after a previous conviction either for felony or such misdemeanor as aforesaid, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for any term not less than seven years, and not exceeding ten years, or imprisoned with or without hard labour, for any term not exceeding three years; and in any indictment for such misdemeanor committed after a previous conviction as aforesaid, it shall be sufficient to state that the offender was at a certain time and place convicted of felony or misdemeanor against 'The Act for the better Prevention of Offences, 1851' (as the case may be), without otherwise describing the previous felony or misdemeanor; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

Sect. 10. "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this act, and to convey or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law."

Sect. 11. "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or

other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law."

Sect. 12. "If any person liable to be apprehended under the provisions of this act, shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned with or without hard labour for any term not exceeding three years."

Sect. 13. "The time at which the night shall commence and conclude in any offence against the provisions of this act shall be the same as in cases of burglary."

With reference to the construction to be put on this statute, it has been decided, that in an indictment against a person for having in his possession without lawful excuse, certain implements of housebreaking, it is unnecessary to allege, or to prove at the trial, an intent to commit a felony. *Bailey's case*, 1 *Dears. C. C. R.* 244; *S. C.* 23 *L. J. M. C.* 13. Keys are implements of housebreaking within sect. 1; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, and with the intention of using them as implements of housebreaking. *Oldham's case*, 2 *Den. C. C. R.* 472; *S. C.* 21 *L. J. M. C.* 134. Maule, J., in this case, expressed an opinion that the printed copy of sect. 1 of the statute had been wrongly punctuated, and that there should be a comma between the words "picklock" and "key."

CATTLE.

OFFENCES WITH REGARD TO CATTLE.

Offences with regard to cattle—stealing horses, cows, sheep, &c.] THE stealing of domestic animals, as horses, cows, sheep, &c., was larceny at common law, and the punishment of persons so offending was likewise provided for by various statutes now repealed, the 7 & 8 Geo. 4, c. 29 (in Ireland the 9 Geo. 4, c. 55), being substituted in their place.

By s. 25 of the 7 & 8 Geo. 4, c. 29, "if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcass or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

The 25th sec. of the Irish statute, the 9 Geo. 4, c. 55, is the same, except that it adds after "ox," the words "steer, bullock."

By the 2 & 3 Wm. 4 c. 62 (U. K.), s. 1, the above acts, so far as regarded the punishment of the offender, were repealed, and it was enacted, that every person convicted of such felonies, or of counselling, aiding, or abetting the commission thereof, should be transported for life. And by 3 & 4 Wm. 4, c. 64 (U. K.), s. 3, such offender might, previously to his being transported, be imprisoned with or without hard labour in the common gaol or house of correction, or be confined in the penitentiary, for any term not exceeding four years, nor less than one year.

Now by the 7 Wm. 4 and 1 Vict. c. 90 (U. K.), s. 1, so much of the 2 & 3 Wm. 4, c. 62, and 3 & 4 Wm. 4, c. 44, as relates to the punishment of persons convicted of offences for which they are liable, under the 2 & 3 Wm. 4, c. 62, to be transported for life, is repealed; and it is enacted, that "every person convicted of any of such offences shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

By s. 3, "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour in the common gaol or house of correction, and also to direct that the

offender shall be kept in solitary confinement, for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court, in its discretion, shall seem meet."

To support a prosecution under the 7 & 8 Geo. 4, c. 29, s. 25, for stealing a horse, &c., the prosecutor must give the same evidence in general, as would be required to maintain an indictment for larceny at common law. From the peculiar nature of the property, a doubt sometimes arises with regard to the *animus furandi* in cases of horse-stealing; it being uncertain whether the horse was taken with an intent to steal, or merely to facilitate the escape of the party with other stolen property.

The least removal in this, as in other cases of larceny, will be sufficient, though part only of the animal be taken. The prisoner was indicted for stealing six lambs, and the evidence was that the carcasses of the lambs without their skins, were found on the premises where they had been kept, and that the prisoner had sold the skins the morning after the offence was committed. The jury having found the prisoner guilty, a doubt arose whether, as the statute 14 Geo. 2, c. 6 (now repealed) specifies feloniously driving away, and feloniously killing, with intent to steal, the whole or any part of the carcass, as well as feloniously stealing in general, although there must, in such cases, be some removal of the thing, it did not intend to make these different offences; but the judges held the conviction right, for any removal of the thing feloniously taken constitutes larceny. *Rawlins's case*, 2 *East, P. C.* 617. The authority of this case, however, so far as the circumstances were held to apply to the rule with regard to the removal of the property, was much shaken in the following: The prisoner was tried upon an indictment (under 14 Geo. 2,) charging him in one count with stealing, and in another with killing, three sheep, with intent to steal the whole of the carcasses. The sheep were in the field of the prosecutor on the evening of the 4th May, and the next morning were found killed and cut open, the inside and entrails taken out, and the tallow and inside fat taken away; the fat cut off the back of two of them was taken away, but the fat on the back of the third was left. The carcasses of the sheep were found lying in the gripe of the hedge, in the same field where the live sheep had been; the entrails were also left, and found in an adjoining field. With regard to the count for stealing, Littledale, J., observed, that in all cases in which a slight removal of the article had been held to amount to larceny, there had always been an intent to steal the article itself, but the thief had been prevented from getting the complete possession and dominion over it; and if it was not held larceny, there would be a failure of public justice. But here there was no intention, in the removal, to drive away or steal the living sheep; but the intent of the removal was to commit another offence, of which he might be capitally convicted. In all the cases where a slight removal had been held larceny, there was evidence given of an actual removal, and how it was done; but here there was no evidence of the removal of the sheep in a live state, and the removal after their death would not support a count for stealing *sheep*, which must be intended to be live sheep. (*Edwards's case, Russ. & Ry.* 497.) The doctrine in *Rawlins's case, supra*, not being satisfactory to the mind of the learned judge, he reserved the case for the opinion of the judges, who were of opinion that the

second count was supported, and not the first, a removal whilst alive being essential to constitute larceny; and nine of the judges held, that the offence of intending to steal a part, was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole, or only to part. *Williams's case*, 1 *Moo. C. C.* 107.

Where the prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 25, for stealing a sheep, and the jury found that it was a lamb; a majority of the judges present, on a case reserved (six to five), held the conviction to be right. *R.* v. *Spicer*, 1 *Den. C. C.* 82; 1 *C. & K.* 699.

And now upon any similar objection being taken, the indictment would be amended under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 107.

The phrase "bullock-stealing," in the 7 Geo. 4, c. 64, s. 28 (see *ante*, p. 358), empowering the court, in certain cases, to order rewards to persons active in the apprehension of offenders, was held by Law, Recorder, to include all cases of cattle-stealing of that particular class or description, as ox, cow, heifer, &c. *Gillbrass's case*, 7 *C. & P.* 444.

The 7 & 8 Geo, 4, c. 29, s. 25, applies only to the stealing of live cattle; and where dead animals are stolen it is but a common larceny, and the punishment is different. See *post*, *tit. Larceny*.

Killing cattle, with intent to steal, &c.] Upon an indictment under the 7 & 8 Geo. 4, c. 29, s. 25, for killing cattle with intent to steal the carcass or skin, or any part of the cattle so killed, the prosecutor must prove the killing and the intent. Upon an indictment for killing a sheep with intent to steal the whole carcass, it is sufficient to prove a killing with intent to steal a part only. *R.* v. *Williams*, 1 *Moody*, *C. C.* 107, *supra*. Where the prisoner was indicted for killing, a lamb, with intent to steal part of the carcass, and it appeared that the prisoner cut off the leg of the animal while living, and carried it away before it died, the judge thought that as the death-wound was given before the theft, the offence was made out; and the prisoner being convicted, on a case reserved, the judges were unanimously of opinion that the conviction was right. *Clay's case*, *Russ. & Ry.* 387. On the trial of an indictment for killing a ewe with intent to steal the carcass, it appeared that the prisoner wounded the ewe by cutting her throat, and was then interrupted by the prosecutor, and that the ewe died two days after. The jury found that the prisoner intended to steal the carcass and convicted him. The judges held the conviction right. *Sutton's case*, 8 *C. & P.* 291; 2 *Moo. C. C.* 29.

Maiming, &c. of cattle.] At common law, the maiming of cattle was not an indictable offence. *Ranger's case*, 2 *East*, *P. C.* 1074. This class of offences was provided against by the Black Act, 9 Geo. 1, c. 22; but that statute was repealed, and in substance re-enacted by the 4 Geo. 4, c. 54; which was also repealed by the 7 & 8 Geo. 4, c. 27. By the 7 & 8 Geo. 4, c. 30, s. 16, "if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male to be once, twice, or thrice publicly

or privately whipped (if the court shall think fit) in addition to such imprisonment."

By the 7 Wm. 4 & 1 Vic. c. 90, s. 2, however, so much of the above act as relates to the punishment of persons convicted of the offences therein specified is repealed, and it is enacted that, "every person convicted after the commencement of such act, of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, and not less than ten years, or to be imprisoned for any term not exceeding three years.

For s. 3 of the above act, authorising the court in awarding imprisonment, to add hard labour and solitary confinement, see *ante*, p. 358.

The Irish statute, the 9 Geo. 4, c. 86, s. 17, enacts, that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony and suffer death as a felon. The 5 & 6 Vict. c. 28, s. 13 (I.), recites the above section, and enacts, "that if any person shall be convicted of the said offence hereinbefore last specified, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years." As to such imprisonment being with or without hard labour, or solitary confinement, see sect. 19 of the latter statute, *ante*, p. 255.

The evidence upon a prosecution under the 7 & 8 Geo. 4, c. 30, s. 16, will be—1, that the animal killed or maimed comes within the description of cattle specified in the statute; and 2, the act of killing or maiming by the prisoner.

Proof of the animal being within the statute.] Upon the repealed statute of 9 Geo. 1, c. 22, which only contained the general word "cattle," it was held, that an indictment for killing a "mare" was good. *Paty's case*, 1 *Leach*, 72; 2 *W. Bl.* 721; 2 *East*, *P. C.* 1074. And see *R.* v. *Tivey*, *post*, p. 362. And so an indictment for wounding a "gelding." *Mott's case*, 1 *Leach*, 73, (*n*). Pigs were held to be within the 9 Geo. 1, c. 22. *Chapple's case*, *Russ. & Ry.* 77. So also asses. *Whitney's case*, 1 *Moody*, *C. C.* 3. It is not sufficient in the indictment to charge the prisoner with maiming, &c. "cattle" generally, without specifying the description. *Chalkley's case*, *Russ. & Ry.* 258.

Proof of the injury.] Upon an indictment for maliciously *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. Upon an indictment for this offence, it was proved that the prisoner had maliciously driven a nail into a horse's foot. The horse was thereby rendered useless to the owner, and continued so to the time of trial; but the prosecutor stated that it was likely to be perfectly sound again in a short time. The prisoner being convicted, the judges, on a case reserved, held the conviction right, being of opinion that the word "wounding" did not imply a permanent injury. *Haywood's case*, *Russ. & Ry.* 16; 2 *East*, *P. C.* 1076. But by *maiming* is to be understood a permanent injury. *Id.* 2 *East*, *P. C.* 1077; *Jeans's case*, 1 *C. & K.* 539. Where the prisoner was indicted under the 4 Geo. 4, c. 54, for wounding a sheep, and it appeared that he had set a dog at the animal, and that the dog, by biting it, inflicted several severe wounds, Parke, J.,

is stated to have said, "This is not an offence at common law, and is only made so by a statute; and I am of opinion, that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute." *Hughes's case*, 2 *C. & P.* 420. As to the construction of the word "wound," see *Wood's case*, 1 *Moody, C. C.* 278; *Wetton's case*, *Id.* 294. Where the prisoner poured a quantity of nitrous acid into the ear of a mare, some of which, getting into the eye, produced immediate blindness, being convicted of maliciously maiming the mare, the conviction was held by the judges to be right. *Owen's case*, 1 *Moody, C. C.* 205. The administering of poison to cattle, however malicious the act may be, is not a felony within the statute, unless the animal die; but the party may be indicted as for a misdemeanor. Where a man was thus indicted, for administering sulphuric acid to eight horses, with intent feloniously to kill them, and it appeared that he had mixed sulphuric acid with the corn, and having done so gave each horse his feed; Park, J., held, that this evidence supported the allegation in the indictment, of a joint administering to all the horses. *Mogg's case*, 4 *C. & P.* 364. Where the prisoner set fire to a cowhouse, and a cow in it was burnt to death, Taunton, J., ruled that this was a killing of the cow within the 7 & 8 Geo. 4, c. 30, s. 16. *Haughton's case*, 5 *C. & P.* 559.

Proof of malice and intent.] Under the repealed statute of 9 Geo. 1, c. 22, it was necessary to show that the act was done out of malice to the owner; but the 7 & 8 Geo. 4, c. 30, s. 25 (see *post*, *tit.*, *Malicious Injuries*,), renders it an offence, whether the act be done from malice conceived against the owner or otherwise. See 2 *Russ. by Grea.* p. 572 (*n*).

On an indictment under the 7 & 8 Geo. 4, c. 30, s. 16, for maliciously wounding a mare, where no malice was shown towards any one, and it did not appear that the prisoner knew to whom the mare belonged, or had any knowledge of the prosecutor, it was contended, that since the 7 Wm. 4 and 1 Vict. c. 90, s. 2, *ante*, p. 361, no punishment could be enforced under the 7 & 8 Geo. 4, c. 30, s. 16, and, consequently, that the twenty-fifth section of that act had no operation, and, therefore, that proof of malice was necessary. Patteson, J., held, that it was not; and the prisoner being convicted, the judges were of opinion that the conviction was right. *R.* v. *Tivey*, 1 *Denison, C. C.* 63; 1 *C. & K.* 704, *S. C.*

Although it is thus rendered unnecessary to give evidence of malice against any particular person, yet an evil intent in the prisoner must appear. Thus, in *Mogg's case*, *ante*, p. 362, Park, J., left it to the jury to say whether the prisoner had administered the sulphuric acid (there being some evidence of a practice of that kind by grooms) with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of his horses; and that in the latter case they ought to acquit him. In the same case the learned judge allowed evidence to be given of other acts of administering, to show the intent.

CHALLENGING TO FIGHT.

What amounts to.] It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to provoke another to send such a challenge, or to fight, as by dispersing letters to that purpose, containing reflections and insinuating a desire to fight. *Hawk. P. C. b.* 1, *c.* 63, s. 3. Thus a letter containing these words, "You have behaved to me like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," was held indictable. *Phillips's case*, 6 *East*, 464; *Rice's case*, 3 *East*, 581. No provocation, however great, is a justification on the part of the defendant. *Rice's case*, 3 *East*, 581; although it may weigh with the court in awarding the punishment.

On an indictment for challenging, or provoking to challenge, the prosecutor must prove—1st, the letter or words conveying the challenge; and 2nd, where it does not appear from the writing or words themselves, he must prove the intent of the party to challenge, or to provoke to a challenge.

Proof of the intent.] In general the intent of the party will appear from the writing or words themselves; but where that is not the case, as where the words are ambiguous, the prosecutor must show the circumstances under which they were uttered, for the purpose of proving the unlawful intent of the speaker. Thus, words of provocation, as "liar," or "knave," though a *mediate* provocation to a breach of the peace, do not tend to it *immediately*, like a challenge to fight, or a threatening to beat another. *King's case*, 4 *Inst.* 181. Yet these, or any other words, would be indictable if proved to have been spoken with an intent to urge the party to send a challenge. 1 *Russ. by Grea.* 298.

Venue.] Where a letter challenging to fight is put into the post-office in one county, and delivered to the party in another, the venue may be laid in the former county. If the letter is never delivered, the defendant's offence is the same. *Williams's case*, 2 *Campb.* 506.

CHEATING.

UNDER this head, the evidence required to support an indictment for a cheat or fraud at common law will be considered. The proofs regarding prosecutions for false pretences are treated of in a subsequent part of this work.

In order to support an indictment at common law for cheating, the prosecutor must prove—1st, that the cheat was of a public nature; 2nd, the mode in which the cheating was effected; thus if it was by a false token, the nature of such false token must be stated in the indictment, and proved in evidence; 3rd, that the object of the defendant in defrauding the prosecutor was successful.

The punishment of this offence is, as in cases of other misdemeanors at common law, fine and imprisonment.

Proof of the nature of the cheating or fraud—affecting the public.] Frauds affecting the crown, and the public at large, are indictable, though they may arise in the course of particular transactions with private individuals. 2 *Russ. by Grea.* 275. The selling unwholesome provisions, 4 *Bl. Com.* 162, or the giving any person unwholesome victuals, not fit for man to eat, *lucri causâ*, 2 *East, P. C.* 822, is an indictable offence. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected, in arrest of judgment, that the indictment could not be sustained, for that it did not appear that what was done was in breach of any contract with the public, or of any civil or moral duty; but the judges, on a reference to them, held the conviction right. *Treeves's case*, 2 *East, P. C.* 821. The defendant was indicted for supplying the royal military asylum at Chelsea with loaves not fit for the food of man, which he well knew, &c. It appeared that many of the loaves were strongly impregnated with alum (prohibited to be used by 37 Geo. 3, c. 98, s. 21), and pieces as large as horse-beans were found; the defence was, that it was merely used to assist the operation of the yeast, and had been carefully employed. But Lord Ellenborough said, "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm." *Dixon's case*, 4 *Campb.* 12; 3 *M. & S.* 11.

There is also another head of public cheats indictable at common law, which are directed against the public justice of the kingdom; such as the doing judicial acts without authority, in the name of another. 2 *East, P. C.* 821. There is the precedent of an indictment against a married woman for pretending to be a widow, and as such,

executing a bail-bond to the sheriff. This probably was considered a fraud upon a public officer in the course of justice. *Ibid. Trem. P. C.* 101; *Cr. Cir. Com.* 78. So it was said by Lord Ellenborough, that he had not the least doubt, that a person making use of a false instrument for the purpose of perverting the course of justice, was guilty of an offence punishable by indictment. *Omealy* v. *Newell*, 8 *East*, 364. So it was held, that a person who, being committed under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, although the attachment not being for non-payment of money, the discharge was a nullity. *Fawcett's case*, 2 *East, P. C.* 862. Doubts were entertained by some of the judges whether this was not a forgery at common law. *Vide post, tit. Forgery.*

Fraudulent malversations or cheats in public officers, are also the subject of an indictment at common law, as against overseers of the poor for refusing to account; *Comming's case*, 5 *Mod.* 179; 1 *Bott*, 232; 2 *Russ. by Grea.* 278; or for rendering false accounts. *Martin's case*, 2 *Campb.* 269; 3 *Chitty, C. L.* 701; 2 *Russ. by Grea.* 278. Upon an application to the court of King's Bench, against the minister and churchwardens of a parish, for misapplying monies collected by a brief, and returning a smaller sum only as collected, the court, refusing the information, referred the prosecutors to the ordinary remedy by indictment. *R.* v. *Ministers, &c. of St. Botolph*, 1 *W. Bl.* 443. *Vide post, tit. Officers.*

Again, where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such a way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court decided otherwise, as it related to the public revenue. *Bembridge's case, cited* 6 *East*, 136.

Another class of frauds affecting the public, is cheating by false weights and measures, which carry with them the semblance of public authenticity. Thus the counterfeiting of the general seal or mark of a trade upon cloth of a certain description and quality, is indictable. *Worrel's case, Trem. P. C.* 106; 2 *East, P. C.* 820. So where the defendant has measured corn in a bushel, and put something in the bushel to fill it up, or has measured it in a bushel short of the stated measure. *Per cur. Pinkney's case*, 2 *East, P. C.* 820.

What cheats are not indictable.] It is not, however, every species of fraud and dishonesty in transactions between individuals, which is the subject-matter of a criminal charge at common law; but in order to constitute it such, it must be an act affecting the public, such as is public in its nature, calculated to defraud numbers, and to deceive the people in general. 2 *East, P. C.* 816.

Where an imposition upon an individual is effected by a false affirmation or bare lie, in a matter not affecting the public, an indictment is not sustainable. Thus where an indictment charged the defendants with selling to a person eight hundred weight of gum, at the price of seven pound per hundred weight, falsely affirming that the gum was gum *seneca*, and that it was worth seven pounds per hundred weight, whereas it was not gum *seneca*, and was not worth more than three pounds, &c., the indictment was quashed. *Lewis's case, Sayer*, 205.

So where the party accompanies his assertion with an apparent

token of no more value than his own assertion. Thus where an indictment at common law charged that Lara, deceitfully intending, by crafty means and devices, to obtain possession of divers lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him (Lara) &c., purporting to be a draft upon his banker for the amount, which he knew he had no authority to do, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained the tickets, and defrauded the prosecutor of the value; judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit, for the banker's check drawn by himself entitled him to no more credit than his bare assertion that the money would be paid. *Lara's case*, 2 *East, P. C.* 819; 6 *T. R.* 565; 2 *Leach*, 652. But such an offence is punishable as a *false pretence* under the statute. *Vide post, title, False Pretences*. So where the defendant, a brewer, was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter, assuring him that they did contain such a measure, when, in fact, they did not contain such a measure, but so much less, &c., the indictment was quashed on motion, as containing no criminal charge. *Wilder's case, cited* 2 *Burr.* 1128; 2 *East, P. C.* 819. Upon the same principle, where a miller was indicted for detaining corn sent to him to be ground, the indictment was quashed, it being merely a private injury, for which an action would lie. *Channell's case*, 2 *Str.* 793; 1 *Sess. Ca.* 366; 2 *East, P. C.* 818. So selling sixteen gallons of ale as eighteen: Lord Mansfield said, "It amounts only to an unfair dealing, and an imposition upon this particular man, from which he could not have suffered but for his own carelessness in not measuring the liquor when he received it; whereas fraud, to be the object of a criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy." *Wheatley's case*, 2 *Burr.* 1125; 1 *W. Bl.* 273; 2 *East, P. C.* 818. Where a miller was charged with receiving good barley, and delivering meal in return different from the produce of the barley, and musty, &c., this was held not to be an indictable offence. Lord Ellenborough said, that if the case had been, that the miller had been owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Wheatley's case* (*supra*) and the other cases, as not being indictable. *Hayne's case*, 4 *M. & S.* 214; *vide Wood's case*, 1 *Sess. Ca.* 217; 2 *Russ. by Grea.* 285. A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves on their presenting the tickets to him, and afterwards to return the tickets, as his vouchers, once a week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract, the guar-

dians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets, with loaves short of the contract weight. It was held, that this was not a fraud indictable at common law. *Eagleton's case*, 24 *L. J. M. C.* 858. The prisoner was, however, convicted of attempting to obtain money by false pretences. See *post*.

The indictment stated that the defendant came to M. in the name of J., to borrow 5*l.*, on which M. lent her the 5*l.*, *ubi re verâ* she never had any authority from J. to borrow the money. The defendant being convicted, on motion in arrest of judgment the whole court thought this not an indictable offence. Holt, C. J., put the following case: A young man seemingly of age, came to a tradesman to buy some commodities, who asked him if he was of age, and he told him he was, upon which he let him have the goods, and upon an action, he pleaded *infra ætatem*, and was found to be under age half-a-year; and afterwards the tradesman brought an action upon the case against him for a cheat; but after a verdict for the plaintiff, judgment was arrested. Powell, J., said, If a woman pretending herself to be with child, does with others conspire to get money, and for that purpose goes to several young men, and says to each that she is with child by him, and that if he will not give her so much money, she will lay the bastard to him, and by these means gets money of them, this is indictable. Holt, C. J., added, "I agree it is so when she goes to several, but not to one particular person." *Glanvill's case, Holt*, 354. From the last observation of Holt, C. J., it appears that Powell, J., was speaking of an indictment for *cheating*, and not, as might be supposed, from using the words, "does with others conspire," of an indictment for conspiracy.

CHILD STEALING.

The offence of child stealing is now provided against by the 9 Geo. 4, c. 31, s. 21; which enacts, "If any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as hereinbefore mentioned, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment: provided always, that no person, who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."

The Irish stat. the 10 Geo. 4, c. 34, s. 25, is, word for word, a transcript of the 9 Geo. 4, c. 31, s. 21.

To support an indictment under this statute, the prosecutor must prove: 1. The leading or taking away, decoying or enticing away of the child, either by force or fraud, as alleged in the indictment. Where the child is not produced as a witness, or is of such tender years as to be unable to give evidence, the taking or decoying, &c. must be proved by the other circumstances of the case. 2. The age of the child. It must be proved that the child is not more than ten years of age; but the precise age mentioned in the indictment is not material. 3. The intent must be proved as laid, and will in general be gathered from all the circumstances of the case. An intent to deprive the parents, &c. of the lawful care or charge of the child may be inferred from the secret manner in which it was taken away. As to the "persons having the lawful care or charge of the child," *vide title, Abduction.*

CONCEALING BIRTH OF CHILD.

Statute.] THE offence of concealing the birth of a child was first provided against by the 21 Jac. 1, c. 27, which was repealed by the 43 Geo. 3, c. 58. The latter statute was also repealed by the 9 Geo. 4, c. 31, which by s. 14 enacts, that "if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, ; and thereupon the court may pass such sentence, as if she had been convicted upon an indictment for the concealment of the birth."

The Irish stat. 10 Geo. 4, c. 34, s. 17, is the same words.

Upon a prosecution for this offence, the prosecutor, after establishing the birth of the child, must prove the secret burying or other disposal of the dead body, and the endeavour to conceal the birth. In general, the evidence to prove the first points will also tend to establish the last.

Secret burying or other disposal of the body.] What has been a sufficient disposal of the body has been a matter of doubt. Where the evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket; Maule, J., directed an acquittal, being of opinion that the statute by the words, "or otherwise disposing of," contemplated a final disposing of the body. *Emma Ash's case*, 2 *Moo. & R.* 294. So where the prisoner had placed the child in a box in her bedroom; Rolfe, B., held, that the disposing of the body must be in some place intended for its final deposit. *Bell's case*, *MS.* 2 *Moo. & R.* 294. These authorities have since been overruled. *Goldthorpe's case*, 2 *Moo. C. C. R.* 244. There the prisoner had been suspected of being with child, but always denied it, and after her delivery persisted in denying that she had been delivered; but on being pressed by the surgeon who examined her, she confessed that the child was between the bed and the mattress, where

it was discovered. The case having been reserved, was considered at a meeting of the judges in Michaelmas term, 1841, at which all the judges, except Alderson, B., Patteson, Erskine, and Bosanquet, JJ., were present, when Lord Abinger, C. B., Maule, J., and Rolfe, B., thought the conviction bad; the other judges held it good, and the conviction was affirmed. The point was again reserved in *Perry's case*, 1 *Dears. C. C. R.* 473; *S. C.* 24 *L. J. M. C.* 137. There the prisoner placed the dead body of the child under the bolster, with the intention of endeavouring, as far as she could, to conceal the body from the surgeon, but with the intention of removing it elsewhere when an opportunity offered. This was held by the Court of Criminal Appeal (Pollock, C. B., *dissentiente*) to be disposing of a dead body within the statute.

Where a prisoner was stopped going across a yard, in the direction of a privy, with a bundle which on examination was found to be a cloth sewed up, containing the body of a child; it was held by Gurney, B., that the prisoner could not be convicted, the offence not having been completed. *Snell's case*, 2 *Moo. & R.* 44. Evidence was given that the prisoner denied her pregnacy, and also, after the birth of the child, denied that also; but she afterwards confessed to a surgeon that she had borne a child. The body of the child was, on the same day, found among the soil in the privy. Patteson, J., held it to be essential to the commission of the offence, that the prisoner should have done some act of disposal of the body, after the child was dead; therefore, if she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child. The prisoner was acquitted. *Turner's case*, 8 *C. & P.* 755. See also *Coxhead's case*, 1 *C. & K.* 623.

A woman may be convicted under the statute, where the body of the child is buried or disposed of by an accomplice, who acts as her agent in the matter. Although by the 14th section, the woman only can be indicted for concealing the birth, an accomplice, who has counselled or abetted the offence, is indictable under the 31st sec. of the same statute, which enacts, that "every person who shall conceal, aid, or abet the commission of any misdemeanor, punishable under this act, shall be liable to be proceeded against and punished as a principal offender." See *Douglas's case* and *Skelton's case, post*, p. 371.

Concealment of the birth.] In defence, the prisoner may prove any circumstances negativing the endeavour to conceal, as that she called for help or confessed herself with child; and upon the same principle evidence was allowed (under the repealed statute 21 Jac. 1, c. 27) of the mother's having made provision for the birth, as a circumstance to show that she did not intend to conceal it. 1 *East, P. C.* 228. A disclosure to an accessary was held to take the case out of the stat. 21 Jac. 1, *Peat's case*, 1 *East*. But this is not now the law.

Frances Douglas and one Robert Hall were indicted for the murder of a female child, of which they were acquitted; whereupon the jury were desired to inquire, whether the female was guilty of endeavouring to conceal the birth. The prisoners had been living together for some time, and in the night, or rather about four in the morning, she was delivered of the child, in the presence of the male prisoner, who was the father of it, and who, with his two sons, aged fourteen and

ten, all slept on the same pallet with her, up four pair of stairs. The male prisoner very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female prisoner remaining in bed up stairs. She was proved to have said she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the delivery; one had been sent for at the commencement of the labour, about twelve at night, but was so ill she could not attend. There were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty and destitution. For the female prisoner it was contended, on the authority of *Peat's case*, that she could not, under these circumstances, be convicted of concealment; but it being doubted whether this case would be now considered law, it was agreed that the opinion of the jury should be taken upon the fact, and if it should be adverse to the prisoner, that the sentence should be respited, and the point reserved. The jury found her guilty of endeavouring to conceal the birth.

The questions for the opinion of the judges were: 1st, Whether there was evidence to convict the prisoner as a principal? 2dly, Whether, in point of law, the conviction was good? The case was argued before all the judges (except Park, J.), who were of opinion, that the communication made to other persons was only evidence, but no bar, and that the conviction was good; but they recommended a pardon. *Douglas's case*, 1 *Moo. C. C.* 480. So in *Skelton's case*, 3 *C. & K.* 119, V. Williams, J., directed the jury, that if a woman be delivered of a child which is dead, and a man take the body and secretly bury it, she is indictable for the concealment by secret burying under s. 14 of the statute, and he for aiding and abetting under s. 31, if there was a common purpose in both in thus endeavouring to conceal the birth of the child; but that the jury must be satisfied, not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man, in pursuance of a common design between them. Platt, B., had ruled in a similar way in *Bird's case*, 2 *C. & K.* 817.

An indictment for endeavouring to conceal the birth of a child need not state whether the child died before, at, or after the birth. *Coxshead's case*, 1 *C. & K.* 623.

Upon an indictment for the murder of a child, the prisoner, on failure of the proof as to the murder, may be convicted by the statute of endeavouring to conceal the birth. But no person but the mother can be so convicted. *Reg.* v. *Wright*, 9 *C. & P.* 154. Where the bill for murder was not found by the grand jury, and the prisoner was tried for murder on the coroner's inquisition; it was held, that she might be found guilty of the concealment, the words of the stat. 43 Geo. 3, being, that "it shall be lawful for the jury, by whose verdict any person *charged* with such murder shall be acquitted, to find," and the judges holding that the coroner's inquisition was a *charge*, so as to justify the finding of the concealment. *Maynard's case*, *Russ. & R.* 240; *Cole's case*, 2 *Leach*, 1095; 3 *Campb.* 371. It may be observed, that the word *charge* does not occur in the statute 9 Geo. 4, c. 31; yet there seems no doubt that the prisoner might be so convicted under the new statute, for she is "tried for the murder of her child" as much on the inquisition as the indictment. 1 *Russ. by Grea.* 514 (*n*).

COINING.

The laws against coining, so far as they relate to the current coin of the realm, were consolidated by the 2 Wm. 4, c. 34 (U. K.), by which the former statutes were repealed.

Proof of counterfeiting the gold and silver coin.] By the 2 Wm. 4, c. 34, s. 3, "if any person shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

By s. 19, "where any person shall be convicted of any offence under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement

for the whole, or any portion or portions of such imprisonment, as to the court, in its discretion shall seem meet."

Now, by the 7 Wm. 4 and 1 Vict. c. 90, s. 5, it is enacted, that "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of a year."

In order to establish the charge of counterfeiting, the prosecutor must prove, 1st, the act of counterfeiting; and 2nd, that the coin counterfeited resembled, or was apparently intended to resemble or pass for the king's current gold or silver coin.

Counterfeiting the gold or silver coin—proof of the counterfeiting.] In order to prove that the prisoner was guilty of counterfeiting, it is not necessary to show that he was detected in the act, but presumptive evidence, as in other cases, will be sufficient, viz., that false coin was found in his possession, and that there were coining tools discovered in his house, &c. But the evidence must be such as to lead to a plain implication of guilt. Two women were indicted for colouring a shilling and a sixpence, and the third prisoner, a man, for counselling them, &c. It appeared that he had visited them once or twice a week; that the rattling of copper money had been heard whilst he was with them, that on one occasion he was seen counting something after he came out; that he resisted being stopped, and jumped over a wall to escape; and that there was found upon him a bad three shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought this evidence too slight to support a conviction. *Isaac's case*, 1 *Russ. by Grea.* 61.

Counterfeiting the gold or silver coin—proof that the coin is counterfeited.] It must be proved both that the coin in question is counterfeit, and that it resembles, or is apparently intended to resemble the king's current gold or silver coin. The fact that the coin counterfeited, or resembled, is the king's current gold or silver, may be proved by evidence of common usage or reputation. 1 *Hale, P. C.* 213.

The proof that the coin in question is in fact false, is provided for by the 17th sect. of the 2 Wm. 4, c. 34, which enacts, that "where, upon the trial of any person charged with any offence against the act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of his Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

In proving the coin to be counterfeit, two questions may arise: first, whether it is in such a state of completion as to be properly described as false and counterfeit *coin*; and secondly, whether it does resemble or is apparently intended to resemble or pass for the king's current gold or silver coin.

With regard to the first question, it is enacted by the 2 Wm. 4, c. 34, s. 3, that the offence of counterfeiting shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. Notwithstanding this provision, it is apprehended, there must still be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The clause appears to have been

intended to provide against such cases as that of Harris, where the metal requiring a process of beating, filing, and immersing in *aqua fortis*, to render the coin passable, the judges held, that the prisoner could not be convicted of counterfeiting. *Harris's case*, 1 *Leach*, 135. See also *Varley's case*, 1 *Leach*, 76; 2 *Wm. Black.* 682; 1 *East, P. C.* 164.

The question whether the coin alleged to be counterfeit does, in fact, resemble or is apparently intended to resemble or pass for the king's current gold or silver coin, is one of fact for the jury; in deciding which they must be governed by the state of the coinage at the time. Thus where the genuine coin is worn smooth, a counterfeit bearing no impression is within the law; for it may deceive the more readily for bearing no impression, and in the deception the offence consists. *Welsh's case*, 1 *East, P. C.* 164; 1 *Leach*, 293; *Wilson's case*, 1 *Leach*, 285. Nor will a variation, not sufficient to prevent the deception, render the coin less a counterfeit. Thus it is said by Lord Hale, that counterfeiting the lawful coin of the kingdom, yet with some small variation in the inscription, effigies, or arms, is a counterfeiting of the king's money. 1 *Hale, P. C.* 215.

It is not necessary to prove that the counterfeit coin was uttered, or attempted to be uttered. 1 *Hale*, 215, 229; 3 *Inst.* 16; 1 *East, P. C.* 215.

Proof of colouring counterfeit coin or metal—and filing and altering legal coin.] By the 2 Wm. 4, c. 34, s. 4, "if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any coin whatsoever, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin; or if any person shall gild, or shall, with any wash or materials capable of producing the colour of gold, wash, colour, or case over any of the king's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold coin; or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or silver, wash, colour, or case over any of the king's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

As to the power of awarding hard labour and solitary confinement, in cases of imprisonment, *see ante*, p. 372.

The act of gilding, or silvering, or colouring, or washing, must be proved; and in the latter case, it must appear that the wash or materials were *capable* of producing the colour of gold or silver. The words of the former statute were, "with any wash or materials *pro-*

ducing the colour, &c." Doubts arose upon the effects of these words, where the colour of gold or silver had not been actually produced, but the coin wanted some further operation to fit it to be passed. *Case's case*, 1 *East*, *P. C.* 165; 1 *Leach*, 154 (*n*); *Lavey's case*, 1 *Leach*, 153; 1 *East*, *P. C.* 166. The doubts, however, cannot exist upon an indictment under the 2 Wm. 4, s. 4, which makes it immaterial whether the colour has been in fact produced. The act of colouring may be proved by evidence that coin so coloured was found in the prisoner's house, or had been procured there, and that the wash or materials required for the purpose were discovered in his possession. An indictment charging the gilding of sixpences with materials capable of producing the colour of gold, is supported by proof of colouring sixpences with gold itself. *Reg.* v. *Turner*, 2 *Moo. C. C.* 42.

Proof of impairing or diminishing the coin.] By the 2 Wm. 4, c. 34, s. 5, "if any person shall impair, diminish, or lighten any of the king's current gold or silver coin, with intent to make the coin so impaired, diminished, or lightened pass for the king's current gold or silver coin, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years." The act of diminishing or impairing, if not shown by direct evidence, may be proved by circumstances, as showing that the prisoner had diminished coin in his possession, and also filing, &c. The intent to pass such coin must then be proved, and if found upon his person, it would be a question for the jury to say whether he did not intend to pass it.

Proof of uttering counterfeit gold or silver coin.] The various offences, with regard to the uttering false gold or silver coin, are comprised within the 7th section of the 2 Wm. 4, c. 34, which enacts, that "if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and, being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes

and offences hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years."

Where a prisoner was convicted under the first part of the above section, of two separate utterings contained in two counts of the same indictment, the judges held, that one judgment for two years' imprisonment was bad, and that there should have been two consecutive judgments of one year's imprisonment each. *Robinson's case*, 1 *Moo. C. C.* 413.

Proof of uttering counterfeit gold or silver coin—evidence of the simple uttering.] Upon an indictment for the simple offence of uttering, the prosecutor must prove the act of uttering, &c. as charged, that the money was counterfeit, and that the prisoner knew it to be such. The practice of "ringing the changes" was held to be an offence under the repealed statute, 15 Geo. 2, c. 28; *Frank's case*, 1 *Leach*, 644; and it is so likewise under the present act. The coin must be proved to be counterfeit in the usual way.

The mode of proving guilty knowledge has been already considered at length, *ante*, p. 88.

A prisoner was indicted for uttering a base coin; it was proved, that he had uttered a counterfeit shilling; and in order to show a guilty knowledge, the counsel for the prosecution tendered in evidence the facts of five other counterfeit shillings having been found in his possession five days after. Taunton, J., after conferring with Alderson, B., held the evidence admissible. *Harrison's case*, 2 *Lewin, C. C.* 118. This decision is at variance with *Taverner's case*, *ante*, p. 92; but seems the more correct ruling; and see *Foster's case*, *ante*, p. 92.

Where several persons are charged with an uttering, it must appear either that they were all present, or so near to the party actually uttering, as to be able to afford him aid and assistance. Three persons were indicted for uttering a forged note, and it appeared that one of them uttered the note in Gosport while the other two were waiting at Portsmouth till his return, it having been previously concerted that the prisoner who uttered the note should go over the water for the purpose of passing the note, and should rejoin the other two. All the prisoners having been convicted, it was held, that the two prisoners who had remained in Portsmouth, not being present at the time of uttering, or so near as to be able to afford any aid or assistance to the accomplice who actually uttered the note, were not principals in the felony. *Soares's case*, *Russ. & Ry.* 25; 2 *East, P. C.* 974. The two prisoners were charged with uttering a forged note. It appeared that they came together to Nottingham, and left the inn there together, and that on the same day, between two and three hours from their leaving the inn, one of the prisoners passed the note; both the prisoners being convicted, the judges held the conviction wrong as to the prisoner who was not present, not considering him as present aiding and abetting. *Davis's case*, *Russ. & Ry.* 113.

If two utterers of counterfeit coin, with a general community of purpose go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are

not joint utterings by both. *Manners' case*, 7 *C. & P.* 801. But it was held by Erskine, J., that if two persons having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition, and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. *Hurse's case*, 2 *Moo. & R.* 360. *Acc. Greenwood's case*, 2 *Den. C. C. R.* 453; *S. C.* 21; *L. J. M. C.* 127.

The giving of a piece of counterfeit coin in charity was held not an uttering within the statute, although the person might know it to be counterfeit, for there must be some intention to defraud. *Page's case*, 8 *C. & P.* 122. See 1 *Russ. by Grea.* 72 (*n*), where the correctness of this decision is doubted. The ruling in *Page's case* has also been thought questionable by Denman, C. J., and Coltman, J., in a recent trial at the Central Criminal Court, in which it was held, that if a person gave a counterfeit coin to a woman with whom he had shortly before had intercourse, it was an uttering within the 2 Wm. 4, c. 34, s. 7; *Reg.* v. ——, 1 *Cox, C. C.* 250.

"To utter and put off" a thing is to "offer it, whether taken or not." *Per Jervis, C. J.*, in *Welch's case*, 20 *L. J. M. C.* 161.

As to a joint uttering by a husband and wife, see *post, title, Coercion by Husband.*

Proof of uttering counterfeit gold and coin—evidence of the compound offence of uttering, having other counterfeit coin in possession.] Where the charge is for the compound offence, the prosecutor must prove, in addition to the evidence required to support the charge of simply uttering, that the prisoner had, at the time of the tendering, other counterfeit coin in his possession. The statute does not require that an intent to pass the latter coin should be proved. Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it. *Jarvis's case*, 25 *L. J. M. C.* 30. In the following case, two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop and there purchased a loaf, for which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was found upon her. The other prisoner who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found upon her, wrapped in gauze paper. It was objected, that the complete offence stated in the indictment was not proved against either of the prisoners; Garrow, B., was of opinion, that the prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say, whether the possession of the remaining pieces of bad money was not joint. The jury found both the prisoners guilty. *Skerrit's case*, 2 *C. & P.* 427.

Proof of previous conviction.] By the 2 Wm. 4, c. 34, s. 9, "where any person [who] shall have been convicted of any offence against this act, shall afterwards be indicted for any offence against

this act, committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same."

Where a prisoner was indicted under the 2 Wm. 4, c. 34, s. 7, for uttering counterfeit money after a previous conviction, and the indictment alleged, that the prisoner, "together with one T. P., was in due form of law tried and convicted" by a jury upon an indictment against them, for that they did unlawfully utter a shilling "to A. W., knowing the same to be false," and thereupon it was considered, that the prisoner should be imprisoned for two years; and that the prisoner afterwards feloniously did utter a half-crown "to T. H., knowing the same to be false." The copy of the record of the former trial stated the conviction of the prisoner, and the acquittal of T. P. It was objected, first, that the indictment was bad for want of addition of time and place to the allegation of knowledge, which was found to be neither in the recital of the former indictment, nor in the substantive charge on the face of the present indictment; but Coleridge, J., thought that the former indictment was good, being in the words of the statute, and after verdict; and, that "knowing" in the present indictment being a participle in the present tense, must import knowledge at the time of uttering. Secondly, that the word "knowing" did not refer to the prisoner, but to A. W. and T. H.; but the learned judge thought that "knowing" did refer to the prisoner, as all that was alleged to be done was alleged to be done by him. Thirdly, that the indictment did not state any former conviction, because neither the plea nor the verdict of the jury were recited; but the learned judge thought, that the allegation that he had been in due course of law tried and convicted, together with a statement of the judgment, was sufficient. Fourthly, that the recital of the former record showed the conviction of the prisoner, and T. P., whereas the record produced showed that the prisoner alone had been convicted, and T. P. acquitted, and therefore there was a variance. The learned judge entertaining some doubt on this point, reserved not only it, but the whole case, for the opinion of the judges. They all thought the conviction good, except Lord Denman, C. J., who thought that specifying the name to whom the coin was uttered introduced an ambiguity. *Reg.* v. *Page*, 1 *Russ. by Grea.* 83; *S. C.* 2 *Moo. C. C. R.* 219.

Proof of buying or selling counterfeit coin for less value than its denomination—importing counterfeit coin.] By the 2 Wm. 4, c. 34, s. 6, "if any person shall buy, sell, receive, pay, or put off or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the United Kingdom from beyond the seas any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit; every

such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

The words of this clause are intended to include all the acts of persons who *deal* in false coin. Under the former statute (8 & 9 Wm. 3, c. 26, s. 6), it was held, that a mere *offer* to put off false money was not indictable; *Wooldridge's case*, 1 *Leach*, 307; 1 *East*, *P. C.* 179; but such an offence is provided for by the new act.

The prosecutor must prove that the money put off, &c. was counterfeit, and must show that it was put off, &c. as stated in the indictment. The averment, with regard to the mode of putting off, &c. is considered as the allegation of a contract, and must be proved as laid. Therefore, the names of the persons to whom the putting off, &c. took place, must be proved; and if it was to persons unknown, the same rule applies as in the case of stealing the goods of a person unknown. 1 *East*, *P. C.* 180. So the price alleged to be given for the false coin must be proved. Where the indictment stated, that five counterfeit shillings were put off at two shillings, and the proof was that they were put off at half-a-crown, it was held a variance, and the prisoner was acquitted. *Joyce's case*, 3 *C. & P.* 411 (*n*); *Carr. Supp.* 184, 1*st ed.* But where the prisoner was charged with putting off a counterfeit sovereign and three counterfeit shillings for the sum of five shillings, and the evidence was, that the prisoner said the purchaser should have a sovereign at four shillings, and three shillings at one shilling, and the purchaser paid in two good half-crowns, it was held all one transaction, and no variance. *Hodge's case*, 3 *C. & P.* 410.

Proof of having possession of counterfeit coin.] By the 2 Wm. 4, c. 34, s. 8, "if any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor or crime and offence, such person shall be deemed guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

The prosecutor must prove, 1, the possession of the false coin; 2, the guilty knowledge; and, 3, the intent to utter or put off the same.

The nature of the possession required to constitute the offence is explained by the interpretation clause (s. 21) of the 2 Wm. 4, c. 34, *post*.

The prisoner was indicted under the above clause (s. 8) for having in his possession three or more pieces of counterfeit coin. The prisoner was taken in company with a man named Large. On their being searched, only two bad shillings were found on the former, but upon Large were found sixteen bad shillings. The jury found, that the prisoner knew that Large had the sixteen bad shillings in his

possession; that he knew that all the shillings found on Large and himself were counterfeit, and that both parties had the common purpose of uttering them. Alderson, B., thereupon directed the jury, that the possession of Large was the possession of the prisoner; and if so, that the latter had three or more counterfeit pieces in his possession, although only two were found upon him. The prisoner being convicted, the learned judge reserved the point for the consideration of the judges, thinking that a difficulty arose out of the interpretation clause (s. 21, *post*), which seemed to confine the possession to the personal custody or possession of the party accused. On the case being argued before the judges, they were divided in opinion; but a majority held, that the possession of Large was the possession of the prisoner, and that the latter was properly convicted. *Rogers's case*, 2 *M. C. C.* 85; *S. C.* 2 *Lewin, C. C.* 119, 297.

So where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, if acting in concert, and both knowing of the possession. *R.* v. *Gerrish and Brown*, 2 *Moo. & R.* 219. See also *R.* v. *Williams, Carr & M.* 259.

The guilty knowledge will be proved in the same manner as under an indictment for uttering false coin, *ante*, p. 376.

The intent to utter must be proved from circumstances; amongst the most cogent of which will be, the fact that upon other occasions the prisoner had uttered false coin.

Where the prisoner is indicted as for a felony, for having in his custody or possession three or more pieces of counterfeit coin, after a previous conviction for the misdemeanor, in addition to the above proofs, evidence must be given of the previous conviction, and of the identity of the parties, according to the 9th section of the statute, *ante*, p. 377.

Proof of counterfeiting, &c. the copper coin.] By the 12th section of the 2 Wm. 4, c. 34, the various offences relating to the copper coin are consolidated into one clause, and it is enacted, that "if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, or if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the king's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, knowing the same to be false or counterfeit, or

shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year."

The evidence upon indictments for offences in counterfeiting or uttering the copper coin, is in general the same as upon indictments for similar offences against the gold or silver coin. It must appear, however, where the charge is for counterfeiting the copper coin, that it was in a fit state to be uttered, the third section of the 2 Wm. 4, c. 34, as to the coining not being complete, not applying to the copper coin.

Proof of counterfeiting foreign coin.] There is no statutory provision against the counterfeiting of foreign coin current in this country by proclamation, the statute 4 Hen. 7, c. 18, being repealed by the 2 Wm. 4, c. 34. The counterfeiting of foreign coin not so current is provided for by the second section of the stat. 37 Geo. 3, c. 126, (an act that does not extend to Ireland), which reciting, that the practice of counterfeiting foreign gold and silver coin, and the bringing into this realm, and uttering within the same, false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called *Louis d'ors*, and pieces of silver coin commonly called *dollars*, has of late greatly increased; and it is expedient that provision be made more effectually to prevent the same, enacts, that if any person or persons shall, from and after the passing of this act, make, coin, or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, such person or persons offending therein shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years.

Upon an indictment under the statute, it must be proved that the coin was counterfeit, in the same manner as in cases of counterfeiting the coin of the realm, *ante*, p. 372, except that there is no provision in the 37 Geo. 3, as to the coin not being perfected. Evidence must be given, that the coin counterfeited is that of the foreign country mentioned in the indictment. By the words in the statute, "not permitted to be current within the realm," must be understood not permitted to be current by proclamation under the great seal. 1 *East, P. C.* 161.

By section 7 of the above statute, a power is given to a justice of the peace, to grant a warrant upon oath, to search the dwelling-house, &c. of persons suspected of counterfeiting foreign coin.

Proof of importing foreign counterfeit coin.] By the third section of the 37 Geo. 3, c. 126, it is enacted, that "if any person or persons shall, from and after the passing of this act, bring into this realm any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the

same within this realm, or within any dominions of the same, all and every such person or persons shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years, not exceeding seven years."

The collecting of the counterfeit monies of foreign countries from the vendors of it in this country, is not a *bringing* of it into the realm, within the above section. 1 *East*, *P. C.* 177.

To support the indictment there must be proved, the fact of the coin being counterfeit, the bringing it into the realm, the guilty knowledge of the prisoner, and his intent to utter it within the realm or the dominions of the same.

Proof of uttering foreign counterfeit coin.] By the fourth section of the 37 Geo. 3, c. 126, it is enacted, that "if any person or persons shall, from and after the passing of this act, utter or tender in payment or give in exchange, or pay or put off to any person or persons, any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every person so offending shall suffer six months' imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time for the like offence of uttering, or tendering in payment, or giving in exchange, or paying or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, such person shall, for such second offence, suffer two years' imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the said first two years; and if the same person shall afterwards offend a third time, in uttering or tendering in payment, or giving in exchange, or paying or putting off any such false or counterfeit coin aforesaid, knowing the same to be false or counterfeit, and shall be convicted of such third offence, he or she shall be adjudged to be guilty of felony, without benefit of clergy."

The evidence on indictment under the above statute, will be substantially the same as for a similar offence against the king's current gold or silver coin. Where a person is indicted for a second uttering, after a previous conviction, a certificate of such former conviction from the clerk of assize or clerk of the peace, is made evidence by the fifth section of the 37 Geo. 3, c. 126.

Proof of having possession of five or more pieces of foreign counterfeit coin.] By the sixth section of the 37 Geo. 3, c. 126, it is enacted, "that if any person or persons shall have in his, her, or their custody, without lawful excuse, any greater number of pieces than five pieces of false or counterfeit coin, of any kind or kinds, resembling, or made with intent to resemble or look like any gold or silver coin or coins of any foreign prince, state, or country, or to pass as such foreign coin, every such person, being thereof convicted, upon the oath of one or more credible witness or witnesses, before one of his Majesty's justices of the peace, shall forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall, for every such offence, forfeit and pay any sum of money not exceeding five pounds, nor less than forty shillings, for every such piece of false or counterfeit coin which shall be found in the custody of such

person; one moiety to the informer or informers, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid, it shall be lawful for such justice to commit the person who shall be adjudged to pay the same, to the common gaol, or house of correction, there to be kept to hard labour, for the space of three calendar months, or until such penalty shall be paid."

Proof of offences with regard to coining-tools.] By the 2 Wm. 4, c. 34, s. 10, " if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin, or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin to proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession any edger, edging-tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanes out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used for, or in order to the counterfeiting of any of the King's current gold or silver coin; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

The prosecutor must prove, first, the commission of the act as stated in the indictment, viz., the making or mending, or beginning to make or mend, or the buying or selling, or the knowingly and without excuse having in custody or possession, the particular coining-tool specified.

The prisoner employed a die-sinker to make for a pretended innocent purpose, a die calculated to make shillings; the die-sinker suspecting fraud, informs the commissioners of the Mint, and under their directions made the die for the purpose of detecting the prisoner. On a case reserved, it was held, that the die-sinker was an innocent agent, and that the prisoner was rightly convicted as a principal, under the 2 Wm. 4, c. 34, s. 10. *Bannen's case*, 2 *Moody, C. C. R.* 309; *S. C.* 1 *C. & K.* 295. The particular tool specified must then

be proved. With regard to all the tools mentioned in the new statute, it should be observed that they are described to be such as will impress "any *part* or *parts* of both or either of the sides" of any of the king's current gold or silver coin; a description of tool not included in the former acts. The new statute, like the former, divides the coining instruments into those upon which there shall be "made or impressed," and those "which will make and impress" the figure, &c. of both, or either of the sides of the lawful coin. The following case therefore is still applicable: The prisoner was indicted for having in his custody a mould upon which there was made and impressed, &c. the figure of a shilling. The mould bore the resemblance of a shilling inverted, viz., the *convex* parts being *concave* in the mould; and it was objected, that it should have been described as an instrument which *would make* or *impress*, &c., and not as one on which *was made and impressed*, &c.; but a great majority of the judges were of opinion, that the evidence maintained the indictment, because the stamp of the current coin was impressed upon the mould. They agreed, however, that it would have been more accurate, had the instrument been described as one "which would make or impress." *Lennard's case*, 1 *Leach*, 92; 1 *East, P. C.* 170.

To convict a prisoner upon an indictment under the 2 Wm. 4, c.34, s. 10, charging him with having in his possession "one mould upon which was impressed the figure and apparent resemblance" of the obverse side of a shilling; Patteson, J., held, that the jury must be satisfied that, at the time the prisoner had it in his possession, the *whole* of the obverse side of the shilling was impressed on the mould. *Foster's case*, 7 *C. & P.* 494. But on a second indictment against the same prisoner, under the above section, for making a mould "intended to make and impress the figure and apparent resemblance" of the obverse side of a shilling, the same learned judge ruled, that it was sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *Id.* 495. An indictment alleging that the prisoner had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad, on demurrer; as not sufficiently showing that the impression was on the mould *at the time* it was in the prisoner's possession. A fresh indictment with the words "then and there" before the words "made and impressed," was held good. *Richmond's case*, 1 *C. & K.* 240.

Upon the repealed statute of 8 & 9 Wm. 3, c. 26, it was held, that it was not confined to such instruments as used by the hand, unconnected with any other power, will produce the effect. A collar marking the edge, by having the coin forced through it by machinery, is an instrument within the act; though this mode of marking the edges is of modern invention. *Moore's case*, 1 *Moody, C. C.* 122.

The words "figure, stamp, or apparent resemblance," do not mean an exact resemblance; but if the instrument will impress a resemblance in point of fact such as will impose upon the world, it is sufficient. *Ridgeley's case*, 1 *East, P. C.* 171; 1 *Leach*, 189. See *Richmond's case*, as to how the indictment should be framed, where a coining mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear. 1 *C. & K.* 240.

With regard to the guilty knowledge of the prisoner there is a distinction to be observed, with respect to the different offences mentioned in sec. 10. Where the indictment is for the making or mending, &c. of

the coining-tools first described, it is not necessary to prove that the prisoner knew the puncheon, &c. to be used, or intended to be used in the making of counterfeit coin; the fact of the instrument bearing the resemblance of the current coin, being necessarily evidence of such knowledge. But it is otherwise upon a charge of making, &c., any edger or edging-tool, in which case it must be proved that the prisoner committed the act, knowing that the instrument was adapted and intended for the marking of coin round the edges. The reason is. that the latter instruments are used in certain trades; and so with regard to making any *press for coinage*, &c., it must be shown that the prisoner knew it to be a press for coinage.

Conveying coining-tools, &c. out of the mint.] By 2 Wm. 4, c. 34, s. 11, "if any person shall without lawful authority, the proof whereof shall lie upon the party accused, knowingly convey out of any of his Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging-tool, collar, instrument, press or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, every such offender shall in England and Ireland be guilty of felony, and in Scotland, of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Defacing coin.] By 16 & 17 Vict. c. 102, s. 1, "if any person shall deface any of the queen's current gold, silver, or copper coin by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, or shall use any machine or instrument for the purpose of bending the same, every such offender shall in England and Ireland be guilty of a misdemeanor, and in Scotland, of a crime or offence, and being convicted thereof, shall be liable to fine or imprisonment, or fine and imprisonment, at the discretion of the court."

Venue.] By the 2 Wm. 4, c. 34, s. 15, "where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction: provided always, that previous crimes and offences against this act committed in Scotland, shall be proceeded against and tried in Scotland in such manner and form as crimes and offences generally have been heretofore had in that country."

Interpretation clause.] By s. 21, it is declared and enacted, that "where the king's current gold or silver coin, or the king's current copper coin, shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin, or any copper coin respectively coined in any of his Majesty's mints, and lawfully current in any part of his Majesty's dominions, whether within the united kingdom or otherwise; and that any of the king's current coin which shall have been gilt, silvered, washed, coloured, or cased

over, or in any manner altered, so as to resemble, or be apparently intended to resemble or pass for any of the king's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin; and that, where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession (see *Rogers's case*, *ante*, p. 380), or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

COMPOUNDING OFFENCES, &c.

Compounding felonies and misdemeanors.] THOUGH the bare taking again of a man's own goods which have been stolen (without favour shown to the thief) is no offence, *Hawk. P. C. b.* 1, *c.* 59, *s.* 7; yet where he either takes back the goods, or receives other amends, on condition of not prosecuting, this is a misdemeanor punishable by fine and imprisonment. *Id. s.* 5. So an agreement to put an end to an indictment for a misdemeanor is unlawful. *Collins* v. *Blantern*, 2 *Wils.* 341, unless it be with the consent of the court. 4 *Bl. Com.* 363; *Beeley* v. *Wingfield*, 11 *East.* 46. Where in an indictment for compounding a felony, it was averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, Bosanquet, J., directed an acquittal. *Stone's case*, 4 *C. & P.* 379; see 1 *Russ. by Grea.* 132 (*n*).

Compounding informations on penal statutes.] Compounding informations on penal statutes is an offence at common law. And by stat. 18 Eliz. c. 5, s. 4, if any informer, by colour or pretence of process, or without process, upon colour or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court, he shall stand two hours in the pillory, be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This statute does not extend to penalties only recoverable by information before justices. *Crisp's case*, 1 *B. & Ald.* 282. But it is not necessary to bring the case within the statute, that there should be an action or other proceeding pending. *Gotley's case*, *Russ. & Ry.* 84. A mere threat to prosecute for the recovery of penalties, not amounting to an indictable offence at common law, is yet, it seems, within the above statute. *Southerton's case*, 6 *East*, 126. A person may be convicted, under this statute, of taking money, though no offence liable to a penalty has been committed by the person from whom the money is taken. *Best's case*, 2 *Moo. C. C.* 124; *S. C.* 9 *C. & P.* 868.

Misprision of felony.] Somewhat analogous to the offence of compounding felony, is that of misprision of felony. Misprision of felony is the concealment, or procuring the concealment of felony, whether such felonies be at common law or by statute. *Hawk. P. C. b.* 1, *c.* 59, *s.* 2. Silently to observe the commission of a felony, without using any endeavour to apprehend the offendor, is a misprision. *Ibid.* (*n*). 1 *Hale, P. C.* 431, 448, 533. If to the knowledge there

be added assent, the party will become on accessary. 4 *Bl. Com.* 121. The punishment for this offence is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners, and other officers, are contained in the 3 Edw. 1, c. 9.

Taking rewards for helping to stolen goods—advertising rewards, &c.] Similar to the offence of compounding a felony, is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose. These offences are provided against by the statute 7 & 8 Geo. 4, c. 29, ss. 58, 59 (E.), and the 9 Geo. 4, c. 55, ss. 51, 52 (I.). By s. 58 (s. 51, I.), "every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall, unless he cause the offender to be apprehended and brought to trial for the same, be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment." Upon an indictment under this statute, it is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not *bonâ fide* intend to use such means as he could for the detection and punishment of the offender. *King's case*, 1 *Cox, C. C.* 36. Where A. was charged under s. 58, with corruptly and feloniously receiving from B. money under pretence of helping B. to recover goods before then stolen from B., and with not causing the thieves to be apprehended, three questions were left to the jury: 1. Did A. mean to screen the guilty parties, or to share the money with them? 2. Did A. know the thieves, and intend to assist them in getting rid of the property by promising B. to buy it? 3. Did A. know the thieves, and assist B., as her agent, and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the first two questions in thenegative, and the third in the affirmative. It was held, that the receipt of the money under the above circumstances was a corrupt receiving of the money by A. within the statute. *Pascoe's case*, 1 *Den. C. C. R.* 456; *S. C.* 18 *L. J. M. C.* 186.

By s. 59 (s. 52, I.), any person advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost, without seizing or making any inquiry after the person producing such property, or promising to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property; or any person printing or publishing such advertisement; shall forfeit fifty pounds, to be recovered by action of debt.

CONSPIRACY.

THE various cases in which a combination between two or more individuals to do certain acts will amount in law to a conspiracy, and be punishable as such, will be shortly stated; and the evidence to support an indictment in such cases, will be then considered.

Proof of the nature of conspiracy—in general.] It has been laid down by a learned judge, that conspiracy is "a crime which consists either in a combination and agreement by persons to do some illegal acts, or a combination and agreement to effect a legal purpose by illegal means." *Per Alderson, B., Reg.* v. *Vincent,* 9 *C. & P.* 91. And in *Rex* v. *Seward,* 1 *A. & E.* 713, Lord Denman, C. J., said, "An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means." But upon this dictum being cited in *Reg.* v. *Peck,* 9 *A. & E.* 686, his lordship said, "I do not think the antithesis very correct." In *Rex* v. *Jones,* 4 *B. & Ad.* 345 however, several learned judges gave a similar definition of the crime of conspiracy. 2 *Russ. by Grea.* 675, and (*n*). In *O'Connell's case,* 11 *C. & Fin.* 15, Tindal, C. J., said, "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent, or even lawful."

With regard to conspiracies in general, it is to be observed, that the nature of the offence requires that more than one person should be concerned in its commission.

A prosecution for a conspiracy cannot be maintained against the husband and wife only, for they are one person in law. *Hawk. P. C. b.* 1, *c.* 72, *s.* 8.

But where two persons are indicted for a conspiracy, one of them may be convicted, though the other, who has pleaded and is alive, has not been tried, and though it is possible he may afterwards be acquitted. *Cooke's case*, 5 *B. & C.* 538; 7 *D. & R.* 673. So where A. and B. having pleaded not guilty to an indictment for conspiracy, B. died between the *venire* and *distringas*, and A. was tried alone, and found guilty; this was held not to be a mistrial. *Kenrick's case*, 5 *Q. B.* 49. But where A. was indicted for conspiracy with Y. and Z., and the jury were of opinion that A. conspired with either Y. or Z., but they did not know which, and Y. and Z. were therefore acquitted; it was held, that A. was entitled to his acquittal also. *Thompson's case*, 16 *Q. B.* 832; *S. C.* 20 *L. J. M. C.* 183.

An agreement by several to do a certain thing may be the subject of an indictment for conspiracy, though the same thing done separately by the several individuals, without any agreement between themselves, would not be illegal, as in the case of journeymen conspiring to raise their wages; for each may insist on his own wages being raised: but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy. *Mawbey's case*, 6 *T. R.* 636; *case of the journeymen tailors of Cambridge*, 8 *Mod.* 11. So where several persons conspired to hiss at a theatre, Lord Mansfield held it indictable, though each might have hissed separately. *Anon. cited in Mawbey's case*, 6 *T. R.* 619. If several persons concur in the act, it appears that they will be all guilty of a conspiracy, notwithstanding they were not previously acquainted with each other. *Per Lord Mansfield, case of prisoners in K. B. Hawk. P. C. b.* 1, *c.* 72, *s.* 2 (*n*). The offence of conspiracy consists in the unlawful agreement, although nothing be done in pursuance of it; for it is the conspiring which is the *gist* of the offence. *Best's case*, 2 *Ld. Raym.* 1167; *Spragg's case*, 2 *Burr.* 993; *Rispal's case*, 3 *Burr.* 1321; 2 *Russ. by Grea.* 674; *Gill's case*, 2 *B. & Ald.* 204; and, therefore, though the object of the conspiracy be felonious, the indictment for the conspiracy still lies; there is no merger. *Button's case*, 11 *Q. B.* 929; *S. C.* 18 *L. J. M. C.* 19. Conspiring to do a lawful act, if for an unlawful end, is indictable. *Edwards's case*, 8 *Mod.* 320; 2 *Russ. by Grea.* 674 (*n*). And so with regard to a conspiracy to effect a legal purpose by unlawful means, and although the purpose be not effected. *Journeymen tailors of Cambridge*, 8 *Mod.* 11; *Best's case*, 2 *Ld. Raym.* 1167; 6 *Mod.* 85; 2 *Russell*, 553; *Eccles' case, Hawk. P. C. b.* 1, *c.* 72, *s.* 3 (*n*).

Proof of nature of conspiracy—to charge party with offence.] A conspiracy to charge an innocent person with an offence, whether temporal or spiritual, is an indictable offence. *Best's case*, 2 *Lord Raym.* 1167; 1 *Salk.* 174; 2 *Russ. by Grea.* 675. And it is no justification of such a conspiracy that the indictment was defective, or that the court had no jurisdiction, or that the parties only intended to give their testimony in a due course of law; for the criminal intention was the same. *Hawk. P. C. b.* 1, *c.* 72, *ss.* 3, 4. Where the charge was for conspiring *falsely* to indict a person for the purpose of extorting

money, and the jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money (without saying *falsely*), it was held sufficient, it being a misdemeanor, whether the charge was true or not. *Hollingberry's case*, 4 *B. & C.* 329. Although several persons may not combine together to prosecute an innocent person, yet they may meet together and consult to prosecute a guilty person, or one against whom there is probable ground of suspicion. *Hawk. P. C. b.* 1, *c.* 72, *s.* 7; 2 *Russ. by Grea.* 677. And no one is liable to any prosecution in respect to any verdict given by him in a criminal matter, either upon a grand or petit jury. *Hawk. P. C. b.* 1, *c.* 72, *s.* 5.

Proof of nature of conspiracy—to pervert the course of justice.] Any combination to obstruct, pervert, or defeat the course of public justice, is punishable as a conspiracy. Thus, a conspiracy to dissuade witnesses from giving evidence is punishable. *Hawk. P. C. b.* 1, *c.* 21, *s.* 15; see *Bushell* v. *Barrett*, *Ry. & M. N. P. C.* 434; or to tamper with jurors; 1 *Saund.* 300; *Joliffe's case*, 4 *T. R.* 285; or to violate the provisions of a statute, and in this case an indictment will lie after the repeal of such statute for an offence committed before the repeal. *Thompson's case*, 16 *Q. B.* 832; *S. C.* 20 *L. J. M. C.* 183. So where several persons conspire to procure others to rob one of them, in order, by convicting the robber, to obtain the rewards then given by statute in such case, and the party who accordingly committed the robbery was afterwards convicted, and actually executed, these persons were indicted for the conspiracy and convicted. *Macdaniel's case*, 1 *Leach*, 45; *Fost*, 130. So a conspiracy, by justices of the peace, to pervert the course of justice by producing a false certificate of a high road being in repair is punishable. *Mabey's case*, 6 *T. R.* 619. A conspiracy to prevent a prosecution for felony, is as much an offence as a conspiracy to institute a false prosecution. *Per Lord Eldon*, *Claridge* v. *Hoare*, 14 *Ves.* 65.

Proof of nature of conspiracies—conspiracies relating to the public funds, &c.] The conspiring by false rumours to raise the price of the public funds on a particular day, with intent to injure purchasers, has been held to be an indictable offence, and also that the indictment is good, without specifying the particular persons who purchased, or the persons intended to be injured. It was also held, that the public government funds of this kingdom might mean either British or Irish funds. *De Berenger's case*, 3 *M. & S.* 67. Bayley, J., said, that to constitute this an offence, it was not necessary that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects; but that it was sufficient if it were prejudicial to a class of the subjects. *Id.* 75. See *Crowther* v. *Hopwood*, 3 *Stark. N. P. C.* 21; 2 *Dod. Ad. Rep.* 174. So a conspiracy to impoverish the farmers of the excise was held indictable; for it tended to prejudice the revenue of the crown. *Starling's case*, 1 *Sid.* 174; 2 *Russ. by Grea.* 680. So a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, was ruled by Lord Ellenborough to be a misdemeanor. *Pollman's case*, 4 *Campb.* 229.

Proof of nature of conspiracy—to create a riot—cause mutiny, &c.] A conspiracy to commit a riot is indictable. 2 *Russ. by Grea.* 681;

2 *Chitty, C. L.* 506. So if a body of persons go to a theatre with the settled intention of hissing an actor or damning a piece, such a deliberate and preconcerted scheme would amount to a conspiracy. *Per Lord Ellenborough*, *Clifford* v. *Brandon*, 2 *Camp.* 369; 6 *T. R.* 628. A combination amongst officers of the East India Company to resign their commissions, with a view to force the company to make them an additional allowance, is indictable, as tending to excite insurrection, and a resignation made under such circumstances is not a determination of the service. *Vertue* v. *Lord Clive*, 4 *Burr.* 2472.

Proof of nature of conspiracy—against morality and public decency.] A combination to do any act contrary to morality or public decency is a punishable misdemeanor, as a conspiracy to seduce a young woman. *Lord Grey's case*, 3 *St. Tr.* 519; 1 *East, P. C.* 460; or to procure an infant female to have illicit carnal connection with a man. *Mears's case*, 2 *Den. C. C. R.* 79; *S. C.* 20 *L. J. M. C.* 59. So a conspiracy to take away a young woman, an heiress, from the custody of her friends, for the purpose of marrying her to one of the conspirators. *Wakefield's case* (*Murray's ed.*), 2 *Deac. Abr. C. L.* 4. A conspiracy to prevent the burial of a corpse, though for the purposes of dissection, has been held to be an indictable offence. *Young's case*, cited, 2 *T. R.* 734; 2 *Chit. C. L.* 36. *Vide post, tit. Dead Bodies.*

Proof of nature of conspiracy—to marry paupers.] The conspiracy by sinister means to marry a pauper of one parish to a settled inhabitant of another, is an indictable offence. *Tarrant's case*, 4 *Burr.* 2106; *Herbert's case*, 1 *East, P. C* 461; *Compton's case*, *Cald.* 246. Where the marriage is by consent of the parties, although money has been given to one of them by the overseer to procure it, it is not an indictable offence. In such a case, Buller, J., directed an acquittal, holding it necessary, in support of such an indictment, to show that the defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means; and this, he said, had been several times ruled by different judges. *Fowler's case*, 1 *East, P. C.* 461; and the same has been determined in a recent case. *Seward's case*, 1 *Ad. & Ell.* 706; 3 *Nev. & M.* 557. Where it is stated to have been by threats and menaces, it is not necessary to aver that the marriage was had against the consent of the parties, though that fact must be proved. *Parkhouse's case*, 1 *East, P. C.* 462. A conspiracy to exonerate a parish from the prospective burthen of maintaining a pauper not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not an indictable offence. *Seward's case, supra.*

By the 7 and 8 Vic. c. 101, s. 6 (E.), "if any officer of a union, parish, or place, endeavour to induce any person to contract a marriage by threat or promise respecting any application to be made, or any order to be enforced with respect to the maintenance of any bastard child, such officer shall be guilty of a misdemeanor."

Proof of nature of conspiracy—affecting trade—to defraud the

public, &c.] A conspiracy to impoverish A. B., a tailor, and to prevent him by indirect means from carrying on his trade, has been held to be indictable. *Eccles's case*, 1 *Leach*, 274; 3 *Dougl.* 337. This offence was considered by Lord Ellenborough to be a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. *Turner's case*, 13 *East*, 228; 2 *Russ. by Grea.* 687 (*n*). Though persons in possession of articles of trade, may sell them at such prices as they individually may please, yet if they confederate and agree not to sell them under certain prices, it is a conspiracy. *Per Lord Mansfield*, *Eccles's case*, 1 *Leach*, 276. Where in an action for libel, it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale there should be a meeting, consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference, between the price at which the goods were bought at the auction and the fair price at this private re-sale, should be shared amongst them, Gurney, B., said, "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a lot of men go to an auction, upon an agreement amongst themselves of the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy." *Levi* v. *Levi*, 6 *C. & P.* 240. See also *Kenrick's case post*, 402. S. sold B. a mare for 39*l.*, and while the price was unpaid B. and C. conspired by false and fraudulent representations made to S. that the mare was unsound, and that B. had sold her for 27*l.*, to induce S. to accept 27*l.*, instead of the agreed on price of 39*l.*; it was held, that the proof of these facts warranted a conviction for a conspiracy. *Carlisle's case*, 1 *Dears. C. C. R.* 337; *S. C.* 23, *L. J. M. C.* 109.

A conspiracy to raise money by means of a bill importing to be a country bank bill, where there is no such bank, and none of the parties are of ability to pay the bill, is indictable. *Anon. Pach.* 1782; *Bailey's MSS.*; *vide post*, 395.

Proof of nature of conspiracies—of workmen to raise wages, &c.] Though every man may work at what price he pleases, yet a combination not to work under certain prices is an indictable offence. *Per Lord Mansfield*, *Eccles's case*, 1 *Leach*, 276. So a combination by workmen, to prevent the workmen employed by certain persons from continuing to work in their employ, and to compel the masters to discharge those workmen, is a conspiracy, and punishable as such. *Byerdike's case*, 1 *Moody & Rob.* 179. So a conspiracy by workmen to prevent their masters from taking *any* apprentices; and it is no variance upon such an indictment, if it appears that the conspiracy was to prevent the masters from taking more than a certain number they then had. *Ferguson's case*, 2 *Stark. N. P. C.* 489. If the masters of workmen combine together to lower the rate of wages, they also are liable to be punished for a conspiracy. See *Hamond's case*, 2 *Esp. N. P. C.* 720.

The law as it at present stands upon this point was laid down by Chief Justice Tindal, in his charge to the grand jury at the Stafford Special Commission, in October, 1843. His lordship there said, "The first observation that arises is, that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled

themselves peaceably together, for the purpose of consulting upon, and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent (if, indeed, it is to be called by that name) is no more than is recognised by the 6 Geo. 4, c. 129 (see *post*, p. 395), by which statute also exactly the same right of combination, to the same extent, and no further, is given to the masters, when met together, if they are of opinion the rate of wages is too high. In the case supposed, that is, a dispute between the masters and the workmen, as to the proper amount of wages to be given, it was probably thought by the legislature, that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way, whose pretensions were not founded in reason and justice; the masters if they offered too little, the workmen if they demanded too much. *Carr. & M.* 662, 663 (*n*).

Formerly various statutes existed for repressing the practice of combination amongst workmen; but these were repealed by the 5 Geo. 4, c. 95, and other provisions substituted. The latter statute, however, being found ineffectual for the purpose intended, it was repealed by the 6 Geo. 4, c. 129 (U. K.), s. 1, which contains the repeal of the former statutes, and enacts the following provisions with regard to the combination of workmen:

By sec. 3, "if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force any journeyman, manufacturer, workman, or other persons hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished; or prevent or endeavour to prevent, any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats, or intimidation, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply, with any rules, orders, resolutions, or regulations, made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business; or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every person so offending, or aiding, abetting, or assisting, therein,

being convicted thereof in manner hereinafter mentioned shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months."

The fourth section enacts, "that this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufucture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into such agreement as aforesaid, shall not be liable to any prosecution," &c.

The fifth section provides and enacts, "that this act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen, or servants for their work, or the hours of the time of working in any manufacture, trade, or business; or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants for their work, or the hours of time for working, in any manufacture, trade, or business; and that persons so meeting for the purpose aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution," &c.

The statute also provides, that offenders shall be obliged to give evidence, and shall be indemnified.

In an indictment under this statute it is sufficient to follow the words of the act: the means employed to make, &c. need not be set out. *Rowland's case*, 2 *Den. C. C. R.* 364; *S. C.* 21 *L. J. M. C.* 81.

Proof of nature of conspiracy—to extort money from individuals.] A conspiracy to extort money from an individual is punishable; as conspiring to charge him with being the father of a bastard child. *Kimberly's case*, 1 *Lev.* 62; *vide ante*, p. 367. And it is an indictable offence, even without an attempt to extort money; for at all events, it is a conspiracy to charge a man with fornication. *Best's case*, 2 *Lord Raym*, 1167. See also *Hollingberry's case*, 4 *B. & C.* 329, *ante*, p. 391.

Proof of nature of conspiracy—to defraud individuals.] Frauds practised by swindlers upon individuals, may sometimes be indictable as conspiracies, 2 *Russ. by Grea.* 683. As where three persons conspired, that one should write his acceptance on a pretended bill of exchange, in order that the second might, by means of this acceptance, and of the indorsement of the third, negotiate it as a good bill, and thereby procure goods from the prosecutor. *Hevey's case*, 2 *East, P. C.* 858 (*n*). So an indictment may be maintained for a conspiracy by the defendants, to cause themselves to be believed persons of considerable property, for the purpose of defrauding a tradesman. *Robert's case*, 1 *Campb.* 399. If a man and woman marry, the man

in the name of another, for the purpose of raising a spurious title to the estate of the person whose name is assumed, it is indictable as a conspiracy, and in such case it was held not to be necessary to show an immediate injury, but that it was for the jury to say, whether the parties did not intend a future injury. *Robinson's case*, 1 *Leach*, 37; 2 *East, P. C.* 1010. The following case has generally been regarded as that of a conspiracy to defraud an individual: The indictment charged, that the defendants, M. and F., falsely intending to defraud T. C. of divers goods, together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine as good and true new Portugal wine of him the said F., for a certain quantity of hats of him, the said T. C., and upon such bartering, &c., the said F., &c., pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines, and the said M. on such bartering, &c. pretended to be a broker of London, when, in fact, he was not; and that T. C. giving credit to the said fictitious assumption, personating, and deceits, did barter, sell, and exchange to F., and did deliver to M., as the broker between T. C. and F., a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine, and that M. and F. on such bartering, &c., affirmed, that it was true new Lisbon wine of Portugal, and was the wine of F., when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to F.; to the great deceit and damage of the said T. C. and against the peace, &c. The indictment, which was for a cheat at common law, did not charge that the defendants *conspired eo nomine*, yet charged that they *together*, &c. did the acts imputed to them, which might be considered to be tantamount; but it was regarded as a case of doubt and difficulty. It does not clearly appear from the reports how the case was decided, but on referring to the roll, it was found that judgment had been entered for the crown. The true ground of that judgment is thought by Mr. East, to be given by Mr. Justice Dennison in *Wheatley's case*. (*MS. Dunning*, *vide* 2 *Burr.* 1129; 6 *Mod.* 302), viz., that it was a conspiracy. *Macarty's case*, 2 *Lord Rayn.* 1179; 3 *Id.* 487; 2 *East, P. C.* 823; 2 *Russ. by Grea.* 685.

An indictment for a conspiracy to obtain goods, which states that the goods were obtained, must state whose property the goods were, or it will be insufficient. *R.* v. *Parker*, 3 *Q. B.* 292.

Proof of nature of conspiracy—to injure individuals in their trade or profession.] A combination to injure any particular individual in his trade or profession, is indictable as a conspiracy; as in *Eccles's case*, 1 *Leach*, 274, already cited, *ante*, p. 393, and in *Lee's case*, 2 *M'Nally on Ev.* 634, *post*, p. 398.

Proof of nature of conspiracy—legal associations.] Associations to prosecute felons, and even to put the laws in force against political offenders, are lawful. *Murray's case, coram Abbott, C. J., Matthews, Dig. C. L.* 90.

Proof of the existence of conspiracy in general.] It is a question of some difficulty, how far it is competent for the prosecutor to show in the first instance, the existence of a conspiracy, amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that part of

the case to be subsequently proved. The rule laid down by Mr. East is as follows: "The conspiracy or agreement among several, to act in concert for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." 1 *East, P. C.* 96. But it is observed by Mr. Starkie, that in some peculiar instances in which it would be difficult to establish the defendant's privity, without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted, to prove the existence of a conspiracy previous to the proof of the defendant's privity. 2 *Stark. Ev.* 234, *2nd ed.* So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. "In indictments of this kind," he says, "there are two things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy." He afterwards proceeds, "Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz., that he consented to the extent that the others did." *Hardy's case, Gurney's ed.* vol. i. p. 360, 369; 2 *Stark. Ev.* 234, *2nd ed.* So in the course of the same trial, it was said by Eyre, C. J., that in the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the court is to be affected for his share of it. *Id.* Upon a prosecution for a conspiracy to raise the rate of wages, proof was given of an association of persons for that purpose, of meetings, of rules being printed, and of mutual subscriptions, &c. It was objected, that evidence could not be given of these facts without first bringing them home to the defendants, and making them parties to the combination; but Lord Kenyon permitted a person, who was a member of the society, to prove the printed regulations and rules, and that he and others acted under them in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of this society, and equally concerned; but added, that it would not be evidence to affect the defendants, until they were made parties to the same conspiracy. *Hammond's case*, 2 *Esp. N. P. C.* 720. So in many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken; 2 *Russ. by Grea.* 699, citing *Lord Stafford's case*, 7 *St. Tr.* 1218; *Lord W. Russell's case*, 9 *St. Tr.* 578; *Lord Lovat's case*, 18 *St. Tr.* 530; *Hardy's case*, 24 *St. Tr.* 199; *Horne Tooke's case*, 25 *St. Tr.* 1. The point may be considered as settled ultimately in *The Queen's case*, 2 *Brod. & Bing.* 310; where the following rules were laid down by the judges, "We are of opinion, that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown, that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed, that, in such cases, the general nature of the

whole evidence intended to be adduced, is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time."

The rule, says Mr. Starkie, that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence, in order to establish the fact of a conspiracy, it is to be remembered, that this is an inversion of the usual order, for the sake of convenience, and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved. 2 *Stark. Ev.* 235, *2nd ed.*

It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within *Rex* v. *Hunt*, 3 *B. & Ald.* 566, where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. *Reg.* v. *Frost*, 9 *C. & P.* 129; 2 *Russ. by Grea.* 700.

Upon an indictment for a conspiracy the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case, circumstantial. 2 *Stark. Ev.* 232, *2nd ed.*; *Cope's case*, 1 *Str.* 144. Thus upon a trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock-lane, Lord Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances. *Parson's case*, 1 *W. Bl.* 392. Upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected for the defendants that, in support of the prosecution, evidence should be given of a *previous* meeting of the parties accused, for the purpose of confederating to carry their object into execution. But Lord Mansfield overruled the objection. He said, that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants, against the person intended to be injured. *Lee's case*, 2 *M'Nally on Evid.* 634. A husband, his wife, and their servants were indicted for a conspiracy to ruin a cardmaker, and it appeared that each had given money to the apprentices of the prosecutor to put grease into the paste, which spoiled the cards, but no evidence was given of more than one of the defendants

being present at the same time; it was objected, that this was not a conspiracy, there being no evidence of communication; but Pratt, C. J., ruled that the defendants, being all of one family, and concerned in making cards, this was evidence of a conspiracy to go to a jury. *Cope's case*, 1 *Str.* 144; 2 *Russ. by Grea.* 693; 2 *Stark. Ev.* 232, 2*nd ed.*

If on a charge of conspiracy it appear, that two persons by their acts are pursuing the same object, and often by the same means, the one performing part of an act, and the other completing it for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirators. Also if on a charge of conspiracy to annoy a broker, who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person, who was at the meeting, said some days after, when he himself was distrained on for church-rates, is not admissible. *Per Coleridge, J., Murphy's case, C. & P.* 297. See also *Blake's case*, 6 *Q. B.* 126; *S. C.* 13 *L. J. M. C.* 131.

The *existence* of the conspiracy may be established either as above stated, by evidence of the acts of third persons, or by evidence of the acts of the prisoner, and of any other with whom he is attempted to be connected, concurring together at the same time and for the same object. And here, says Mr. East, the evidence of a conspiracy is more or less strong, according to the publicity or privacy of the objects of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater coincidence in the other, the stronger is the evidence of conspiracy. 1 *East. P. C.* 97.

Proof of the existence of conspiracy—declarations of other conspirators.] Supposing that the existence of a conspiracy may in the first instance be proved, without showing the participation or knowledge of the defendants, it is still a question whether the declarations of some of the persons engaged in the conspiracy, may be given in evidence against others, in order to prove its existence; and upon principle such evidence appears to be inadmissible. The opinions of the judges upon this question have been at variance. In *Hardy's case*, which was an indictment for high treason, in conspiring the death of the king, it was proposed to read a letter written by *Martin*, in London, and addressed, but not sent, to *Margarot*, in Edinburgh (both being members of the Corresponding Society), on political subjects, calculated to inflame the minds of the people in the North; Eyre, C. J., was of opinion, that this letter was not admissible in evidence against any but the party confessing; two of the judges agreed that a bare relation of facts by a conspirator to a stranger, was merely an admission which might affect himself, but which could not affect a co-conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency of the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy. Buller, J., was of opinion, that the evidence of the conversations and declarations by parties to a conspiracy, was in general, and of neces-

sity, evidence to prove the existence of the combination. Grose, J., was of the same opinion; but added, that he considered the writing *as an act* which showed the extent of the plan. *Hardy's case*, 25 *St. Tr.* 1. Mr. Starkie remarks, that upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession, unconnected with any act, would not have been admissible. 2 *Stark. Ev.* 236, 2*nd ed.* In the same case it was proposed to read a letter written by Thelwall, another conspirator, to a private friend. Three of the judges were of opinion that the evidence was inadmissible, since it was nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot for its furtherance; it was a sort of confession by Thelwall, and not like an act done by him, as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion, that the evidence was admissible, on the ground that every thing said, and *à fortiori* every thing done by the conspirators, was evidence to show what the design was.

The law on this subject is thus stated by Mr. Starkie: It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy; though consultations for that purpose, and letters written in prosecution of the design, even if not sent, are admissible. The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger, that a conspiracy existed amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers. 2 *Stark. Ev.* 235. And this doctrine has been recognised by Mr. Serjeant Russell. 2 *Russ. by Grea.* 697. See also *Murphy's case*, *ante*, p. 399.

Proof of acts, &c. done by other conspirators.] The cases in which, after the existence of a conspiracy is established, and the particular defendants have been proved to have been parties to it, the acts or declarations of other conspirators may be given in evidence against them, have already been considered (*vide*, *ante*, p. 82 *to* p. 86). It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not; for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design; a principle wholly unaffected by the consideration of their being jointly indicted. Neither does it appear to be material what the nature of the conspiracy is, provided the offence involve a conspiracy. Thus upon an indictment for murder if it appear that others, together with the prisoner, conspired to commit the crime, the act of one done in pursuance of that intention, will be evidence against the rest. 2 *Stark Ev.* 237, 2*nd ed.* See 6 *T. R.* 528; 11 *East*, 584. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a

chartist association, and that Jones was also a member, and that in the evening of the 3rd of November, the defendant had been at Jones's houses, and was heard to direct the people there assembled to go to the racecourse, where Jones had gone on before with others; it was held that a direction given by Jones, in the forenoon of the same day to certain parties to meet on the racecourse, was admissible; and it being further proved that Jones and the persons assembled on the racecourse went thence to the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. *Shellard's case*, 9 *C. & P.* 277. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a particular in the fraud. *Whitehead's case*, 1 *Dow. & Ry. N. P.* 61.

Proof of the means used.] Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed upon or pursued to effect it. 2 *Russ by Grea.* 692; *Eccles's case*, 1 *Leach*, 274. But where the indictment charged the defendants with conspiring "to cheat and defraud the lawful creditors of W. F.," Lord Tenterden thought it too general, in not stating what was intended to be done or the persons to be defrauded. *Fowle's case*, 4 *C. & P.* 592; but see *De Berenger's case*, 3 *M. & S.* 67. So where the indictment charged the defendants with a conspiracy "to cheat and defraud the said H. B. of the fruits and advantages" of a verdict, Lord Denman, C. J., held it bad, as being too general. *Richardson's case*, 1 *Moo. & R.* 402.

Where the indictment charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences. Bayley, J., said that, when parties had once agreed to cheat a particular person of his money, although they might not then have fixed on any means for the purpose, the offence of conspiracy was complete. *Gill's case*, 2 *Barn & Ald.* 204. In *Reg.* v. *Parker*, 3 *Q. B.* 292, Williams, J., said, "It has been always thought, that in *Rex* v. *Gill* the extreme of laxity was allowed." But in *Sydserff* v. *Reg.* 11 *Q. B.* 245, an indictment charging that the defendants "unlawfully, fraudently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor "of his goods and chattels," was held good on writ of error; and the court in giving judgment expressly upheld the decision in *Gill's case*. See upon this point *King* v. *Reg. in error*, 7 *Q. B.* 782; *S. C.* 14 *L. J. M. C.* 172; and *Rowland's case*, 2 *Den. C. C. R.* 364; *S. C.* 21 *L. J. M. C.* 81, *ante*, 395. When the act only becomes illegal from the means used to effect it, the illegality must be explained by proper statements, and established by proof; as in the cases already referred to of conspiracies to marry paupers. 2 *Russ. by Grea.* 692; see *ante*, p. 392.

An indictment charged in the first count, that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being in-

debted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors. Held, 1. That the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not showing by what means they were to be defrauded. 2. That the second count was bad for not alleging facts to show in what manner the deed of sale was fraudulent. *Peck* v. *Reg.*, 9 *A. & E.* 686. See also *Wright* v. *Reg.*, 14 *Q. B.* 148.

An indictment charged that A. and B. conspired by false pretences and subtle means and devices, to obtain from F. divers large sums of money, of the monies of F., and to cheat and defraud him thereof. The means of the conspiracy were not further stated. It was, however, held that this was sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that horses were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them. *Kenrick's case*, 5 *Q. B.* 49; over-ruling *Pywell's case*, 1 *Stark*, 402. See also *Reg.* v *Blake*, 6 *Q. B.* 126, and *Rowland's case*, *supra*.

Where an indictment charged that the defendants conspired by false pretences to obtain from persons named divers goods and merchandise, and to cheat and defraud them of the said goods and merchandise, and, in pursuance of the conspiracy, did by false pretences (which were stated) obtain from them the goods, &c., aforesaid, and did cheat and defraud them thereof, to the damage of the persons named. It was held bad in arrest of judgment in not stating whose the goods, &c., were. *R.* v. *Parker*, 3 *Q. B.* 292. The defendants A. and B. were indicted for conspiring to extort money from the prosecutor, by charging him with forging a certain check for 178*l.*; the indictment set forth a letter from one of the conspirators to the prosecutor, referring to the cheque, and conversations were proved, relating to it. Such a document was, in fact, in existence, but it was not produced by the prosecutor at the trial, and such production was held to be unnecessary; for it might have been that the existence of such a cheque was altogether a fabrication. *Ford's case*, 1 *Nev. & M.* 777.

Proof of the means used—cumulative instances.] Upon an indictment charging the defendants with conspiring to cause themselves to be believed persons of considerable property, for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to the tradesmen employed to furnish it, as persons of large fortune. A witness was then called to prove, that at a different time they had made a similar representation to another tradesman. This evidence was objected to, on the ground that the prosecutor could not prove various acts of this kind, but was bound to select and confine himself to one. Lord Ellenborough, however, said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." *Roberts's case*, 1 *Campb.* 399.

Proof of the object of the conspiracy.] The object of the conspiracy must be proved as laid in the indictment. An indictment against A. B. C. and D. charged that they conspired together to obtain "*viz.*: to the use of them the said *A. B.* and *C.* and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Lord Ellenborough said, "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think it is not as to D. He is charged with conspiring to procure the appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. Where a conspiracy is charged, it must be charged truly." *Pollman's case*, 2 *Campb.* 233.

In an indictment for conspiring to defraud D. *and others*, which charged the obtaining of the goods of D. *and others*, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D. is inadmissible. *Steel's case*, 2 *Moo. C. C.* 246; *S. C. Carr & M.* 337. See *Thompson's case*, 16 *Q. B.* 832; *S. C.* 20, *L. J. M. C.* 183.

Where a count in an indictment charged several defendants with conspiring together to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. *O'Connell* v. *Reg.*, 11 *C. & F.* 155.

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. *Ib.*

A count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. *Ib.*

Particulars of the conspiracy.] Where the counts of an indictment for conspiracy were framed in a general form, Littledale, J., (after consulting several other judges) ordered the prosecutor to furnish the defendants with a particular of the charges, and that the particular should give the same information to the defendants that would be given by a special count. But the learned judge refused to compel the prosecutor to state in his particular the specific acts with

which the defendants were charged, and the times and places at which those acts were alleged to have occurred. *Hamilton's case*, 7 *C. & P.* 448.

Cross-examination of witnesses.] Where, on an indictment for a conspiracy against A. B. and C., C. only called a witness, and examined him as to a conversation between himself and A., it was objected that the counsel for the prosecution had not a right to cross-examine him as to other conversations between C. and A.; but Abbott, J., said that he could not prevent him from going into all the conversations which might affect C., though it might be a matter for future consideration, whether A.'s counsel would, after such evidence, have a right to address the jury upon it. The witness was accordingly examined as to several conversations between A. and C. which principally affected the former. *Kroehl's case*, 2 *Stark. N. P. C.* 343.

Venue.] The *gist* of the offence in conspiracy, being the act of conspiring together, and not the act done in pursuance of such combination, the venue in principle ought to be laid in the county in which the conspiring took place, and not where, in the result, the conspiracy was put into execution. *Best's case*, 1 *Salk.* 174; 2 *Russ. by Grea.* 696. But it has been said, by the court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. *Brisac's case*, 4 *East*, 171. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint co-operation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. *Bowes's case*, cited in *Brisac's case*, *supra*.

It has been holden the courts of quarter sessions have jurisdiction in cases of conspiracy. *Rispal's case*, 3 *Bur.* 1320; 1 *W. Bl.* 368.

But now by the 5 and 6 Vict. c. 38, s. 1, "neither the justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person."

Conspiracy to murder in Ireland.] By the 10 Geo. 4, c. 34, s. 8, (I.), it is enacted, that all persons conspiring, confederating, and agreeing to murder any person, shall be guilty of felony, and suffer death as felons; and by section 9, every person who shall solicit, encourage, persuade or endeavour to persuade, or who shall propose to any person to murder any other person, shall be guilty of felony and suffer death. These clauses have been taken from the 36 Geo. 3, c. 27 (I.), and 38 Geo. 3, c. 57 (I.), and are peculiar to the law of Ireland. 1 *Gabbett's Criminal Law of Ireland*, 258.

DEAD BODIES;

OFFENCES RELATING TO.

ALTHOUGH larceny cannot be committed of a dead body, no one having a property therein (*vide post, title Larceny*), yet it is an offence against decency to take a dead body with intent to sell or dispose of it for profit; and such offence is punishable with fine and imprisonment as a misdemeanor. An indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence, that no case was reserved. *Gilles's case*, 1 *Russ. by Grea.* 464; *Russ. & Ry.* 366. (*n.*) So to take up a dead body even for the purpose of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment, that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores*; that the purpose of taking up the body for dissection did not make it less an indictable offence, and that as it had been the regular practice at the Old Bailey, in modern times, to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments, was a proof the universal opinion of the profession upon this subject. *Lynn's case*, 2 *T. R.* 733; 1 *Leach*, 497; see also *Cundick's case*, *Dowl. & Ry. N. P. C.* 13.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 86, be suspended by the ordinary for three months; and if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal courts by indictment or information. *Per Abney, J., Andrews* v. *Cawthorne, Willes*, 357. (*n.*)

To bury the dead body of a person who has died a violent death, before the coroner has sat upon it, is punishable as a misdemeanor, and the coroner ought to be sent for, since he is not bound *ex officio* to take the inquest without being sent for. *Clerk's case*, 1 *Salk.* 377; *Anon.* 7 *Mod.* 10. And if a dead body in a prison or other place, upon which an inquest ought to have been taken, is interred, or is suffered to lie so long that it putrifies before the coroner has viewed

it, the gaoler or township shall be amerced. *Hawk. P. C. b.* 2, *c.* 9, *s.* 23; see also *Sewell's Law of Coroner*, p. 29.

The preventing a dead body from being interred has likewise been considered an indictable offence. Thus the master of a workhouse, a servant, and another person, were indicted for a conspiracy to prevent the burial of a person who died in a workhouse. *Young's case*, cited 2 *T. R.* 734.

Provision is made for the interment of dead bodies which may happen to be cast on shore, by the 48 Geo. 3, c. 75.

By the 2 and 3 Wm. 4, c. 75, for regulating schools of anatomy, (s. 10) professors of anatomy, and the other persons therein described, being duly licensed, are not liable to punishment for having in their possession human bodies according to the provision of the act. The 18th section of this statute makes offences against the act misdemeanors, and subjects offenders to be punished by imprisonment, not exceeding three months, or by fine not exceeding fifty pounds.

DEER;

OFFENCES RELATING TO.

Stealing Deer.] The former statutes with regard to the offence of stealing deer, are repealed by the act of 7 and 8 Geo. 4, c. 27, and the law upon the subject is now contained in the 7 and 8 Geo. 4, c. 29 (E.)

By the 26th section of that statute, "if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the enclosed part of any forest, chace, or purlieu, or in any enclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chace, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and if any person, who shall have been previously convicted of any offence relating to deer for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences hereinbefore last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

The word "deer," in this statute includes all ages and both sexes; "a fawn," therefore. *Reg.* v. *Strange*, 1 *Cox*, *C. C.* 58.

By sec. 27 of the above statute, suspected persons found in possession of venison, &c., and not satisfactorily accounting for the same, are rendered liable to a penalty not exceeding 20*l.*

By sec. 28, persons setting snares or engines for the purpose of taking or killing deer, or destroying the fences of land where deer shall be kept, on conviction before a justice, shall forfeit a sum not exceeding 20*l.*

Power of deer-keepers, &c. to seize guns, &c.] By sec. 29 of the above statute, if any person shall enter into any forest, chace, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender

any gun, fire-arms, snare, or engine, in his possession, and any dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer.

Assaulting deer-keepers or their assistants.] By the same section, if any such offender (*vide supra*) shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

Pulling a deer-keeper to the ground, and holding him there while another person escapes, is not a beating of the deer-keeper within this section. There must be a beating in the popular sense of the word; proof of a battery only is insufficient. *Per Maule, J., in Hale's case*, 2 *C. & K.* 326.

DISTURBING PUBLIC WORSHIP.

By the 52 Geo. 3, c. 155, (E.) s. 12, "if any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by this act, or any former act or acts of parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending upon proof thereof, before any justice of the peace, by two or more credible witnesses shall find two sureties to be bound by recognizances in the penal sum of fifty pounds, to answer such offence, and in default of such sureties shall be committed to prison there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general quarter sessions, shall suffer the pain and penalty of forty pounds."

For a similar provision with respect to roman catholic chapels, but imposing a penalty of 20*l.* for the offence, see 31 Geo. 3, (E.) c. 32, s. 10.

Upon an indictment found at the sessions under the toleration act, 1 W. & M. c. 18, for disturbing a dissenting congregation, it was held that, upon conviction each defendant was liable to the penalty of 20*l.* imposed by that statute. *Hube's case*, 5 *T. R.* 542.

This offence may be tried at the sessions, 52 Geo. 3, c. 155, s. 12, *supra*, or in the king's bench, or at the assizes, if removed by *certiorari* from the sessions. *Hube's case*, *supra*; *Wadley's case*, 4 *M. & S.* 508.

With regard to Ireland the 6 Geo. 1, c. 5, (I.) s. 14, enacts, that if any person shall willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, such person upon proof thereof before any justice of the peace by two or more witnesses, shall find two sureties, to be bound by recognizance, in the penal sum of fifty pounds, to appear at the next general or quarter sessions for the county wherein such offence shall be committed, or in default thereof, be committed to prison till such next quarter sessions, and upon conviction at the said sessions shall forfeit 20*l.* to the use of the king. See *Hube's case*, 5 *T. R.* s. 42. No statute made for the relief of roman catholics, contains any express clause for protecting the ministers or congregations of this persuasion from disturbance or interruption in performing the service of their church in Ireland, but it seems that any disturbance of the public worship of a congregation assembled according to law would be indictable without the aid of any statute, (1 *Hawk.* c. 28, s. 23; 1 *Keb.* 491,) and more particularly if it be connected with any riotous or tumultuous proceeding at the time, or arising out of any previous conspiracy for the purpose. See moreover the 27 Geo. 3, c. 15, (I.) s. 5, and 8 Vict. st. 2, c. 28, s. 6, (I.) 1 *Gab.*, *Crim. Law of Ireland*, 294, 295.

DWELLING HOUSE;

OFFENCES RELATING TO.

As to "*Burglary*" see *ante*, p. 326.

HOUSE-BREAKING.

Statutes 7 & 8 Geo. 4, c. 29, and 7 Wm. 4 & 1 Vict. c. 90.] The offence of house-breaking or stealing in a dwelling-house, was provided against by several statutes, which were repealed by the 7 and 8 Geo. 4, c. 27.

By the 7 and 8 Geo. 4, c. 29, (E.) s. 12, (the 9 Geo. 4, c. 55, s. 12,) it is enacted, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever, every such offender, being convicted thereof, [shall suffer death as a felon.]

By the 3 and 4 Wm. 4, c. 44, (E. & I.) the punishment of death was repealed, and offenders, whether principals or accessaries before the fact, might be transported for life, or for not less than seven years, and, previously to transportation, were liable to be imprisoned with or without hard labour, or to be confined in the Penitentiary for not exceeding four years, or were liable to be imprisoned with or without hard labour, for not exceeding four years, nor less than one year.

Now by the 7 Wm. 4 and 1 Vict. c. 90, (U. K.) s. 1, entitled "An Act to amend the law relative to offences punishable by transportation for life," so much of the 3 and 4 Wm. 4, c. 44, as relates to the punishment of any person convicted of the offence of breaking and

entering any dwelling-house, and stealing therein, as in that act mentioned, is repealed; from and after the commencement of the act, every person convicted of any such offence shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

By s. 3, it is enacted, "that in awarding the punishment of imprisonment, for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

The 13th section of the 7 & 8 Geo. 4, c. 29, with regard to what shall be considered part of the dwelling-house in burglary, (which has been already given, *ante*, p. 349,) applies likewise to this offence.

The offence of house-breaking differs from that of burglary, in requiring that an actual larceny should be committed in the house, a mere attempt to commit felony not being sufficient, and also in not requiring that the offence shall be committed in the night.

The prosecution to support an indictment for house-breaking must prove, 1, the breaking and entering; 2, that it is a dwelling-house; 3, the larceny.

Proof of the breaking and entering.] It is sufficient to prove such a breaking and entering, as, if done in the night, would have constituted burglary; 1 *Hale*, 522, 526, 548; *Foster*, 108; 2 *East, P. C.* 638; 2 *Russ.* 47. If it should be proved to have been done in the night, so as to amount to burglary, it would seem that the party may, notwithstanding, be convicted of house-breaking. See *Pearce's case, R. & R.* 174; *Robinson's case, Id.* 321; but see *Tandy's case*, 1 *C. & P.* 297. Where the sash of a window was partly open, but not so much so as to admit the body of a person, and the prisoner raised it so as to admit a person, upon an indictment for house-breaking, this was held not to amount to a *breaking*. *Henry Smith's case*, 1 *Moody, C. C.* 178; *ante*, p. 330. See also *Robinson's case, Id.* 327; *ante*, p. 330. Where the entry was effected through a hole, which had been left in the roof, for the purpose of light, Bosanquet, J., held, that it was not sufficient to constitute a breaking of the house. *Sprigg's case*, 1 *Moo. & Rob.* 357, *ante*, p. 331.

Proof of the premises being a dwelling-house.] Whatever building is, in contemplation of law, a dwelling-house, in which burglary may be committed, is a dwelling-house also, so far as respects the offence of house-breaking. 2 *Russ. by Grea.* 849. A chamber in an inn of court, was held to be a dwelling-house within the repealed statute 39 Eliz. c. 15. *Evans's case, Cro. Car.* 473.

With regard to out-buildings, the repealed statute before mentioned containing the words "dwelling-house or houses, or any part thereof, or any out-house or out-houses belonging and used to and with any dwelling-house," the auxiliary statute 3 & 4 W. & M. c. 9, varied the words, using "dwelling-house, shop, or warehouse thereunto belonging, or therewith used." Both these statutes are now repealed, and the 7 & 8 Geo. 4, c. 29, uses only the term "dwelling-house."

Such buildings, therefore, as at common law, were considered part of the dwelling-house, (as to which, *vide ante*, p. 335,) come within the protection of the statute, and buildings situated within the curtilage, must appear to be within the provisions of 7 & 8 Geo. 4, c. 29, s. 13, *ante*, p. 335.

Proof of the larceny.] The larceny must be proved, as in other cases, with this addition, that it must be shown to have taken place in the house. The least removal of the goods from the place where the offender found them, though they be not carried off out of the house, is within the act, as in other larcenies, for the statute does not create a new felony, but only alters the punishment of a particular species of larceny. *Simpson's case*, 1 *Hale*, *P. C.* 527; *Kel.* 31; 2 *East*, *P. C.* 639. See *Amier's case*, 6 *C. & P.* 341. Where the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house, and gave them to the mob, who stood outside of the door; this was holden not to be a stealing in the dwelling-house. *Reg.* v. *Leonard*, *Arch. Crim. Pl.* 240, 10*th ed.*

STEALING IN A DWELLING-HOUSE TO THE AMOUNT OF FIVE POUNDS.

Statutes 7 & 8 *Geo.* 4, *c.* 29, *and* 7 *Wm.* 4 & 1 *Vict. c.* 90.] This offence, so far as it extended to the sum of 40*s.*, was provided against by the statute 12 Anne, c. 7 (now repealed). The sum being raised to 5*l.*, the offence was made a capital felony by 7 & 8 Geo. 4, c. 29 (E.), and the 9 Geo. 4, c. 55 (I.)

By the 12th section of those statutes, it is enacted, that if any person shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more, every such offender, being convicted thereof, [shall suffer death as a felon.]

By the 2 & 3 Wm. 4, c. 62, (U. K.) the capital punishment was repealed, and transportation for life substituted; and by the 3 & 4 Wm. 4, c. 44, s. 3, the offender might be imprisoned and kept to hard labour, or confined in the Penitentiary before transportation; *ante*, p. 410.

Now by the 7 Wm. 3 & 1 Vict. c. 90, (U. K.) s. 1, so much of the two last-mentioned acts as relates to the punishment of persons convicted of offences, for which they are liable under the 2 & 3 Wm. 4, c. 62, to be transported for life, and so much of the 3 & 4 Wm. 4, c. 44, as relates to the punishment of any person convicted of the offence of breaking and entering any dwelling-house, and stealing therein, as in that act mentioned, is repealed, and it is enacted, that every person convicted of any such offences shall be liable to be transported beyond the seas for the term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

S. 3 of the above act, authorises the court, in cases of imprisonment, to award hard labour and solitary confinement. By 12 & 13 Vict. c. 11, s. 2, tenants and lodgers stealing from houses or apartments let to them, if the value exceed 5*l.* are punishable as before the passing of that act. See *post*, *tit. Larceny*.

To support an indictment for this offence, the prosecutor must prove—1, the stealing; 2, that the goods, &c., stolen, were of the value of 5*l.* or more; and 3, that they were stolen in a dwelling-house.

Proof of the stealing of the goods—what goods.] It is not all goods of the value of 5*l.* or more, which may happen to be within the house, the stealing of which will come within the statute. A distinction is taken between goods which are, as it has been termed, *under the protection of the house*, and those which are not. Therefore, where goods are feloniously obtained from *the person*, they are not considered to be goods within the protection of the house, as where the occupier of the house gave a bank note to the prisoner, to get changed, who thereupon stole it, the judges, upon a case reserved, were of opinion, that this was not a capital offence within the 12 Anne, c. 7. *Campbell's case*, 2 *Leach*, 564; 2 *East*, *P. C.* 644. So where the prisoner obtained a sum of money from the prosecutor, in the dwelling-house of the latter, by *ring-dropping*, this also was held not to be within the statute. The judges were of opinion, that to bring a case within the statute, the property must be under the protection of the house, deposited there for safe custody, as the furniture, money, plate, &c., kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house. *Owen's case*, 2 *East*, *P. C.* 645; 2 *Leach*, 572. The same point was ruled in subsequent cases. *Castledine's case*, *Watson's case*, *Id.* 674.

For the cases where goods have been held to be within the protection of the house, see *post*, p. 414.

Proof of the value of the goods stolen.] It must appear not only that the goods stolen were of the value of 5*l.*, but likewise that goods to that value were stolen upon one occasion, for a number of distinct larcenies cannot be added together to constitute a compound statutable larceny. Where it appeared that the prisoner had purloined his master's property to a very considerable amount, but it was not shown that he had ever taken to the amount of 40*s.* at any one particular time, upon an indictment under the 12 Anne, c. 7, the court held that the property stolen must not only be in the whole of such a value as the law requires to constitute a capital offence, but that it must be stolen to that amount at one and the same time; that a number of distinct petty larcenies could not be combined so as to constitute grand larceny, nor could any distinct number of grand larcenies be added together, so as to constitute a capital offence. *Petrie's case*, 1 *Leach*, 295. And the same was ruled by Ashurst, J., in a subsequent case. *Farley's case*, 2 *East*, *P. C.* 740. But it may vary the consideration, if the property of several persons lying together in one bundle or chest, or even in one house, be stolen together, at one time; for there the value of all may be put together, so as to make it grand larceny, or to bring it within a statute which aggravates the punishment, for it is one entire felony. 2 *East*, *P. C.* 740. And where the property was stolen at one time to the value of 40*s.*, and a part of it only, not amounting to 40*s.*, was found upon the prisoner, the court left it to the jury to say, whether the prisoner had not stolen the remainder of the property, which the jury accordingly found. *Hamilton's case*, 1 *Leach*, 348; 1 *Russ. by Grea.* 857.

Where the prisoner, who was in the prosecutor's service, stole a quantity of lace in several pieces, which were not separately worth 5*l.*, and brought them all out of his master's house at one time, Bolland, B., held that the offence was made out, although it was suggested that the prisoner might have stolen the lace a piece at a time. *Jones's case*, 4 *C. & P.* 217. The learned baron mentioned a case tried before Garrow, B., where it appeared that the articles,

which were separately under the value of 5*l*., were in fact stolen at different times, but were carried out of the house all at once, and the latter learned judge held, after much consideration, that as the articles were brought out of the house altogether, the offence (which was then capital) was committed.

Proof of the stealing being in a dwelling-house.] The same evidence which is adduced in indictments for burglary, or housebreaking, *vide supra*, will be sufficient proof of the premises being a dwelling-house upon this indictment, and the thirteenth section of the 7 & 8 Geo. 4, c. 29, extends to this as well as the above-mentioned offences. *Vide ante*, p. 349. See *Turner's case*, 6 *C. & P.* 407.

It has been held, on a case reserved, that stealing in a dwelling-house to the value of 5*l*., or more, by the owner of the house, is within the 7 & 8 Geo. 4, c. 29, s. 12. *Reg.* v. *James Bowden*, 2 *Moo. C. C.* 285; *S. C.* 1 *C. & K.* 147. As to the ownership of the house of an adjudged felon, see *Reg.* v. *Whitehead*, 2 *Moo. C. C.* 181.

The house in which a person lodges merely has always been held not to be his dwelling-house, so as to prevent the commission of this offence in it by him. Therefore, where a lodger invited the prosecutor to take part of his bed, without the knowledge of his landlord, and stole his watch from the bed-head, it was held by the judges that he was properly convicted of stealing in a dwelling-house. *Taylor's case*, *R. & R.* 418. So where goods were left by mistake at a house in which the prisoner lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. *Carroll's case*, 1 *Moo. C. C.* 89. So if a man on going to bed, put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *Thomas's case*, *Car. Sup.* 295. So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while the man was asleep, Parke, B., and Patteson, J., after referring to *Taylor's case*, *supra*, were of opinion, that the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the statute. *Hamilton's case*, *C. & P.* 49. It would appear that had the prosecutor been awake instead of asleep, in *Taylor's case*, the property was sufficiently within his personal control to render the stealing of it a stealing from the person, and that an indictment under the above enactment would not have been sustainable. *Reporter's note to Hamilton's case*, *supra*. See 1 *Russ. by Grea* 855 (*n*). But where a person put money under his pillow, and it was stolen whilst he was asleep, this was held not a stealing of money in the dwelling-house within the meaning of the 12 Anne, c. 12. 2 *Stark. C. P.* 467; *Rex* v. *Challenor*, *Dick. Quar. Sess.* 235, *5th ed.*; 1 *Russ. by Grea.* 855.

It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *Thomas's case*, *supra*.

As in burglary, the ownership of the dwelling-house must be proved as laid.

Consequences of verdict against one of several, as to part of the offence.] Although a verdict may be found against one only, upon a joint indictment, yet if all the prisoners are found guilty, they must be found guilty of the compound larceny. Thus, where A. and B.

were indicted under the statute 12 Anne, c. 7, for stealing goods to the value of 6*l*. 10*s*. in a dwelling-house, and the jury found A. guilty of such stealing to the value of 6*l*., and B. to the value of 10*s*.; upon a case reserved, the judges were of opinion, that judgment could not be given against both the prisoners, but that on a pardon being granted, or a *nolle prosequi* entered as to B., judgment might be given against A. *Hempstead's case*, *Russ. & Ry.* 344. And see *Campbell* v. *Reg.* 11 *Q. B.* 799.

Conviction for, on indictment for burglary.] Upon an indictment for burglary, and stealing to more than the amount of 5*l*., on a failure to prove a breaking and entering in the night-time, the prisoner may be convicted of stealing in a dwelling-house to the value of 5*l*. *Rex* v. *Compton*, 3 *C. & P.* 418.

STEALING IN A DWELLING-HOUSE, ANY PERSON THEREIN BEING PUT IN BODILY FEAR.

Statute 7 Wm. 4 and 1 Vict. c. 86.] This offence was provided against by the statute 3 W. & M. c. 9, s. 1 (repealed by 7 & 8 Geo. 4, c. 27), and the provisions of the former statute were re-enacted in the 7 & 8 Geo. 4, c. 29 (E.), and the 9 Geo. 4, c. 55 (I.)

By the twelfth section of which statutes it was enacted, that if any person should break or enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever, or should steal any such property to any value whatever in any dwelling-house, any person therein being put in fear, every such offender, being convicted thereof, should suffer death as a felon.

By the 7 Wm. 4 & 1 Vict. c. 86 (E. & I.), s. 1, so much of the above act as relates to stealing in a dwelling-house, any person therein being put in fear, and so much of the same act as relates to the punishment of principals in the second degree, and of accessaries before and after the fact to the said offence, are repealed, except as to offences committed before the 30th September, 1837, which are to be dealt with and punished as if the recent act had not passed.

By s. 5, "whosoever shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas, for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

S. 7, authorises hard labour and solitary confinement, in cases of imprisonment.

By s. 9, the word "property" is, throughout the act, to be deemed to denote everything included under the words "chattel, money, or valuable security," used in the 7 & 8 Geo. 4, c. 29.

The thirteenth section of the 7 & 8 Geo. 4, c. 29, *vide ante*, p. 349, describing the buildings which are to be considered parcel of the dwelling-house, is applicable to this offence.

Upon an indictment for this offence, the prosecutor must prove—1st, the stealing; 2d, that it took place in a dwelling-house; and 3rd, that some person therein was put in bodily fear or some menace or threat. It will only be necessary in this place to state the evidence with regard to the latter head.

Proof that some person was put in bodily fear.] Some doubt existed with regard to the interpretation of the words "being put in fear," under the repealed statutes, but the correct opinion appeared to be, that though it was necessary that some person in the house should be put in fear by the offenders, yet it was not essential that the larceny should be committed in the presence of that person. 2 *East, P. C.* 633; 1 *Russ. by Grea.* 851. Whether or not it was necessary under the former statutes (and the words of the 7 & 8 Geo. 4, c. 29, were the same) to prove the actual sensation of fear felt by any person in the house, or whether if any person in the house was conscious of the fact at the time of the robbery, the fact itself raised the implication of fear from the reasonable grounds existing for it, did not appear to be anywhere settled. (2 *East, P. C.* 634, 635.) According to Mr. East, the practice was to require proof of the actual fear excited by the fact, when committed out of the presence of the party, so as not to amount to a robbery at common law. But he added, that certainly if the person in whose presence the thing was taken was not conscious of the fact at the time, the case would not fall within the act. 2 *East, P. C.* 634, 635. Now by the 7 Wm. 4 & 1 Vict. c. 90, s. 3, the nature of the acts are defined by which fear is to be excited, and in order to make out the offence, it must be proved that some person, then being in the house, was put in bodily fear, by the use of some menace or threat. Upon an indictment for stealing in a dwelling-house, some persons therein being put in fear, the prisoner may be convicted of the simple larceny. *Etherington's case*, 2 *Leach*, 673.

BREAKING AND ENTERING A BUILDING WITHIN THE CURTILAGE.

A distinction having been created by the 13th sections of the 7 & 8 Geo. 4, c. 29 (E.), and the 9 Geo. 4, c. 55 (I.), between such buildings within the curtilage, as have a communication between themselves and the dwelling-house, either immediately or by means of a covered and inclosed passage, and such buildings as have not; the latter species of buildings are protected by a separate enactment.

By the 7 & 8 Geo. 4, c. 29 (E.), s. 14, and the 9 Geo. 4, c. 55 (I.), s. 14, it is enacted, "that if any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned every such offender being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of 5*l.* in a dwelling-house, containing a separate count for such offence [shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."]

Now by the 7 Wm. 4, & 1 Vict. c. 90 (U. K.), s. 2, so much of the above section as relates to the punishment of persons convicted of the offence therein specified, is repealed, and it is enacted, that every person convicted after the commencement of this act, of any such

offence, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding three years.

By s. 3, hard labour and solitary confinement may be awarded, in cases of imprisonment.

It has been observed, upon the 7 & 8 Geo. 4, c. 29, s. 14, that specifying as it does, in express terms, a building within the curtilage of a dwelling-house, it appears not to apply to many of those buildings and out-houses, which although not within any common inclosure or curtilage, were deemed by the old law of burglary parcel of the dwelling-house, from their adjoining such dwelling-house, and being in the same occupation. 2 *Russ. by Grea.* 861. To this it may be added, that the enactment likewise does not seem to extend to those buildings, which being within the curtilage, yet not communicating with the dwelling-house internally, are still held to be parcel of the dwelling-house, as in several of the cases already mentioned.

Upon an indictment framed upon this enactment, the prosecutor must prove—1st, a breaking and entering, as in burglary; 2nd, a stealing within the building; 3rd, that the building comes within the statute, *viz.* that it is a building, within the curtilage of a dwelling-house occupied therewith, and not being part of such dwelling-house, according to the 13th section of the same statute; and, as above suggested, it should also appear that the building is not part of the dwelling-house, according to the rules of the common law.

On the trial of an indictment for breaking into a building within the curtilage, it appeared that the building was in the fold-yard of the prosecutor's farm, and that to get from his dwelling-house to the fold-yard, it was necessary to pass through a yard called the pump-yard, into which the back door of the dwelling-house opened, the pump-yard being separated from the fold-yard by a wall four feet high, in which there was a gate. The fold-yard had another gate leading to the fields on one side, a hedge with a gate leading to a high road on another, the other sides of the fold-yard being bounded by the farm building, and a continuous wall from the dwelling-house. It was held that the building was within the curtilage. *Reg.* v. *Gilbert*, 1 *C. & K.* 84.

For the 15th section of the 7 & 8 Geo. 4, c. 29, relating to breaking and entering shops, &c., see *title*, *Shop*.

EMBEZZLEMENT.

Statute 7 & 8 Geo. 4, c. 29.] The offence of embezzlement, by clerks and servants, was provided for by the 39 Geo. 3, c. 85; but that statute is now repealed, and the substance of it re-enacted by the 7 & 8 Geo. 4, c. 29.

By the 47th section of the latter statute it is enacted, for the punishment of embezzlements committed by clerks and servants, "that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for, or in the name, or on the account, of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed, and every such offender being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned." (Sec. 46, transportation for not exceeding fourteen years, nor less than seven, or imprisonment for not exceeding three years, and if a male, whipping, see *post*, *title*, *Larceny*.)

The 40th section of the Irish statute, the 9 Geo. 4, c. 55, corresponds with the above 47th clause, except that after the words "master" are added the words "or employer."

Hard labour and solitary confinement may be added, in cases of imprisonment by the 7 & 8 Geo. 4, c. 29, s. 4, and by the above Irish statute, qualified by the 7 Wm. 4, & 1 Vict. c. 90 (E. & I.), s. 5.

And by 7 & 8 Geo. 4, c. 29, s. 48, (s. 41, I.) for preventing the difficulties that have been experienced in the prosecution of the last-

mentioned offenders, it is enacted, "that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him, against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly."

Upon a prosecution under this statute, the prosecutor must prove; 1st, that the prisoner was a clerk or servant, or a person employed for the purpose or in the capacity of a clerk or servant, and that by virtue of such employment he received the money, &c.; 2nd, that he received or took into his possession some chattel, money, or valuable security for or on account of his master; and 3rd, that he fraudulently embezzled the same, or some part thereof.

Proof of being a servant—what servants are within the act.] It is not every person who is employed as a servant that comes within the provisions of the statute as to embezzlement; it must be in the course of the servant's employment to receive money, in order to render him liable. Thus, the servant of a carrier employed to look after the goods, but not entrusted with the receipt of money, is not within the statute. *Thorley's case*, 1 *Moo. C. C.* 343. The prisoner was an apprentice to a butcher, and his duty was to carry out the meat, but he had never been employed to receive money. Having delivered a bill for meat to one of his master's customers, he embezzled the amount. Being convicted of the embezzlement, the judges, on a case reserved, held the conviction wrong, on the ground that it did not appear, by the evidence, that the prisoner was employed to receive money for his master, or receive the money in question by virtue of his employment. It seemed to be the opinion of the judges that an apprentice was a servant, within the meaning of the act. *Mellish's case, Russ. & Ry.* 80. Where the prisoner was employed to lead a stallion, with authority to charge and receive a fixed sum, but not less, and he received a less sum and embezzled it, this was holden not to be within the statute, because the money was not received by virtue of his employment. *Snowley's case*, 4 *C. & P.* 390. A. a brewer sent his drayman B. out with porter, with authority to sell it at fixed prices only. B. sold some of it to C. at an under price, and did not receive the money at the time; but A. hearing of this, unknown to B., told C. to pay B. the amount, which C. did, and B. when asked for it by A. denied the receipt of the money. Patteson, J., held this to be sufficient evidence of embezzlement. *Aston's case*, 2 *C. & K.* 413. In the more recent case of *R.* v. *Harris*, 1 *Dears. C. C. R.* 344; *S. C.* 23 *L. J. M. C.* 110. Parke, B., expressed himself as satisfied with his decision in *Snowley's*

case. In *R.* v. *Harris*, the prisoner was the miller of a mill in a county gaol, and it was his duty to direct persons bringing grain to be ground to obtain from the porter a ticket specifying the quantity of the grain, which ticket was the miller's order for receiving the grain. He was to receive the grain with the ticket, to grind the grain, to take the money for the grinding, and to account for it to the governor, who had to account to the treasurer. The miller had no right to grind any grain at the mill for his own benefit. The prisoner ground some grain for certain persons who never obtained a ticket, and who were not directed by the prisoner to get one, and he applied the money paid for the grinding to his own use. It was held that the prisoner had been improperly convicted of embezzlement; the judges being of opinion that the money was not received on account of his master, but by a misuse of the power of his master's mill.

Where a servant, who was not authorised to receive money, was standing near a desk in his master's counting-house, and a person, who owed money to the master, paid it to the servant, supposing that he was authorised to receive money, and the servant never accounted for the money to his master; this was held no embezzlement. *Crowley's case*, cited by *Alderson, B.*, in *Hawtin's case, infra.* So where A. owed the prosecutor 5*l.*, and paid it to the prisoner, who was the prosecutor's servant, supposing him authorised to receive it, which he was not, and the prisoner never accounted to his master for the money; Alderson, B., held, that this was not embezzlement. *Hawtin's case*, 7 *C. & P.* 281. See also *Reg.* v. *Bearcock*, 1 *Cox, C. C.* 187. But it is sufficient if he was employed only upon the one occasion in question to receive money, if acting at that time in the capacity of a servant so employed. Thus, a person employed by a carrier was directed by his employer to receive a sum of 2*l.*, which he did receive and embezzled; and on a case reserved, the judges were of opinion that he was rightly convicted of embezzlement. *Spencer's case, Russ. & Ry.* 299. So where a drover keeping cattle for a farmer at Smithfield, was ordered to drive the cattle to a purchaser and receive the money, which he did, and embezzled it, the judges were unanimously of opinion that the prisoner was a servant, within the meaning of the act, and that the conviction was right. *Hughes's case*, 1 *Moo. C. C.* 370.

But where a drover was employed by a grazier in the country to drive eight oxen to London, with instructions that if he could sell them on the road he might, and those he did not sell on the road he was to take to a particular salesman in Smithfield, who was to sell them for the grazier; and the drover sold two on the road, and instead of taking the remaining six to the salesman, drove them himself to Smithfield market and sold them there, and received the money and applied it to his own use; it was held by Littledale, J., and Parke, B., (there being separate indictments against the prisoner for larceny and embezzlement,) that he could not be convicted of either offence. *Goodbody's case*, 8 *C. & P.* 665.

It is not necessary that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. The prisoner was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which the prisoner did, and embezzled them. Being indicted

(under the 39 Geo. 3, c. 85,) for this embezzlement, a doubt arose whether it was by virtue of his employment, and the case was reserved for the opinion of the judges. Abbott, C. J., Holroyd, J., and Garrow, B., thought that the prisoner did not receive the money by virtue of his employment, because it was out of the course of his employment to receive it. But Park, J., Burrough, J., Best, J., Hullock, B., and Bayley, J., thought otherwise; because, although out of the ordinary course of the prisoner's employment, yet as, in the character of servant, he had submitted to be employed to receive the money, the case was within the statute. *Thomas Smith's case, Russ. & Ry.* 516.

So although it may not have been part of the servant's duty to receive money, in the capacity in which he was originally hired, yet if he has been in the habit of receiving money for his master, he is within the statute. Thus, where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them; Richards, C. B., held him to be a servant within the 39 Geo. 3, c. 85, saying, that he had no doubt the statute was intended to comprehend masters and servants of all kinds, whether originally connected in any particular character and capacity or not. *Barker's case, Dow. & Ry. N. P. C.* 19.

If the servant be intrusted with the receipt of money from particular persons, in the ordinary course of his employment, and receives money from other persons and embezzles it, the case seems to be within the act. The prisoner was employed by the prosecutors in the capacity of clerk, as *evening collector*, in which character it was his duty to receive every evening, from the porters employed in the business, such money as they had received from the customers in the course of the day; and it was the prisoner's duty to pay over these sums to another clerk the following morning. He was not expected in the course of his employment to receive money from the customers themselves. Having called on a customer for the payment of a bill, he received a check and embezzled it. Being convicted of this offence, the judges, on a case reserved, were of opinion that as the prisoner was intrusted to receive from the porters such moneys as they had collected from the customers in the course of the day, the receiving immediately from the customers, instead of receiving through the medium of the porters, was such a receipt of money "by virtue of his employment" as the act was meant to protect. *Beechey's case, Russ. & Ry.* 319. So where the prisoner received a sum of money from one of his master's regular customers, and it appeared that it was not part of his duty to receive moneys from those persons, it was ruled by Arabin, S., after consulting Gaselee, J., Alderson, B., and Gurney, B., that this was within the statute. *Williams's case*, 6 *C. & P.* 626.

A female servant is within the statute. *Elizabeth Smith's case, Russ. & Ry.* 267. So likewise is an apprentice. *Mellish's case, Russ. & Ry.* 80, *ante*, p. 419. So a clerk or servant to a corporation, although not appointed under the common seal, for he is, notwithstanding, a person employed as a clerk or servant within the statute. *Beacall's case*, 1 *C. & P.* 457; 2 *Russ. by Grea.* 169 (*n.*): and in *Williams* v. *Stott*, 1 *Crom. & M.* 689, it is said by Vaughan, B., that there can be no doubt that the statute would be held to embrace persons employed in the capacity of clerks or servants to corporations.

A person who is the servant of two persons in partnership, is the

servant of each within the act (but see *post*, p. 423.) The prisoner was in the employ of B. and R. as their book-keeper. While in this situation he received into his possession the notes in question, being the private property of B., to be deposited in the safe where the money of the firm was usually kept. Being indicted for embezzling these notes, it was objected that he was the servant of the partners, and not of the individuals; but Bayley, J., held that he was the servant of both [each,] and said that it had been decided by the judges, that where a traveller is employed by several houses to receive money, he is the individual servant of each. *Carr's case*, *Russ. & Ry.* 198, *post*, p. 423; *Leech's case*, 3 *Stark.* 70. A person employed by A. B. to sell goods for him at certain wages, may be convicted of embezzlement as the servant of A. B., though at the same time employed by other persons, and for other purposes. *Reg.* v. *Batty*, 2 *Moo. C. C.* 257.

A. being one of several proprietors of a Hereford and Birmingham coach, horsed it from Hereford to Worcester, and employed the prisoner to drive it when he did not drive it himself, the prisoner having all the gratuities, as well when A. drove as when the prisoner did so. It was the prisoner's duty, on each day when he drove, to tell the book-keeper at Malvern how much money he had taken, the book-keeper entering the sum, together with what he had taken himself, in a book and on the way-bill, and he then had to pay over the latter sum to the prisoner, who was to give the two sums to A. The prisoner gave true accounts to the book-keeper, who made true entries, but the prisoner accounted for smaller sums to A., saying that these were all, and paid over to A. such smaller sums. All the proprietors were interested in the money, but A. was the party to receive it, and he was accountable to his co-proprietors. It was held by Patteson, J., that this was embezzlement, and that the prisoner was rightly described in the indictment as the servant of A., and that the money embezzled was properly laid as the money of A. *White's case*, 8 *C. & P.* 742; *S. C.* 2 *Moo. C. C.* 91.

The prisoner was a carrier, whose only employment was to carry unsewed gloves from a glove manufacturer at A. to glove-sewers who resided at B., to carry back the gloves when sewed, and to receive the money for the work, and pay it to the respective glove-sewers, deducting his charge. On some occasions, instead of paying over the money received for certain of the glove-sewers, he denied the receipt of it, and appropriated it to his own use. It was held, that he could not be considered the servant of the persons defrauded, and therefore was not liable to be convicted of embezzlement, for his offence was a mere breach of trust, as he was bailee of the money. *Gibb's case*, 1 *Dears. C. C. R.* 445; *S. C.* 24 *L. J. M. C.* 63.

Proof of being a servant within the statute—wages or payment of servant.] Several cases have occurred in which doubts have arisen whether the party offending could be considered a *servant* within the meaning of the statute, on account of the manner in which he was remunerated for his services. The allowance of part of the profit on the goods sold will not prevent the character of servant from arising. The prisoner was employed to take coals from a colliery and sell them, and bring the money to his employer. The mode of paying him was by allowing him two-third parts of the price for which he sold the coal, above the price charged at the colliery. It was objected that the money was the joint property of himself and

his employer; and the point was reserved for the judges, who held that the prisoner was a servant within the act. They said that the mode of paying him for his labour did not vary the nature of his employment, nor make him less a servant than if he had been paid a certain price per chaldron or per day; and as to the price at which the coals were charged at the colliery in this instance, that sum he received solely on his master's account as his servant, and by embezzling it he became guilty of larceny within the statute. *Hartley's case, Russ. & Ry.* 139. See also *Wortley's case*, 2 *Den. C. C. R.* 333; *S. C.* 21 *L. J. M. C.* 44. The prisoner was employed by the prosecutors, who were turners, and was paid according to what he did. It was part of his duty to receive orders for jobs, and to take the necessary materials from his master's stock to work them up, to deliver out the articles, and to receive the money for them; and then his business was to deliver the whole of the money to his masters, and to receive back, at the week's end, a proportion of it for working up the articles. Having executed an order, the prisoner received three shillings for which he did not account. Being convicted of embezzling the three shillings, a doubt arose whether this was not a fraudulent concealment of the order, and an embezzlement of the materials; but the judges held the conviction right. *Hoggins's case, Russ. & Ry.* 145.

A partner in a firm contracted to give his clerk one-third of his own share in the profits. The other partners knew of and assented to the arrangement. It was held by Chambre, J., that this did not make the clerk a partner, and he was convicted of embezzlement. *Holmes's case*, 2 *Lew. C. C.* 256. The above learned judge quoted a parallel case on the northern circuit before Wood, B. The prisoner was employed by a Mr. F. as master of a coal vessel, who sent him with a cargo of coals. The custom of the trade was for the person who superintended the business to receive two-thirds of the freight, and the owner one-third. The prisoner took the whole; whereupon he was indicted for embezzlement, and convicted. It was objected, on his behalf, that he and the owner were joint proprietors of the freight, but a large majority of the judges held the conviction right.

Proof of being a clerk, within the statute.] A person who acts as a traveller for various mercantile houses, takes orders, and receives moneys for them, and is paid by a commission, is a *clerk* (but see *post*) within the statute. The prisoner was indicted for embezzling the property of his employers, Stanley & Co. He was employed by them and other houses as a traveller, to take orders for goods, and collect money for them from their customers. He did not live in the house with them. He was paid by a commission of five per cent. on all goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way than as above stated. Stanley & Co. did not allow him anything for the expenses of his journeys. Having been convicted of embezzling money, the property of Stanley & Co., the judges, on a case reserved, held the conviction right. *Carr's case, Russ. & Ry.* 198.

But in *Goodbody's case, ante*, p. 420, Parke, B., said, "I am of opinion, that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent. There is one case in which it was held that a man may be the servant of several at

one time (*Carr's case*, *supra*; and see *R.* v. *Batty*, *ante*, p. 422); but I wish to have that question further considered by the judges."

A person employed by overseers of the poor, under the name of their accountant and treasurer, is a clerk within the statute. The prisoner acted for several years for the overseers of the parish of Leeds, at a yearly salary, under the name of their accountant and treasurer, and as such received and paid all the money receivable or payable on their account, rendering to them a weekly statement, purporting to be an account of moneys so received and paid. Having retained a portion of the moneys for his own use, he was indicted and convicted of embezzlement; and on a case reserved, the judges were of opinion that he was a clerk and servant within the 39 Geo. 3, c. 85. *Squires's case*, *Russ. & Ry.* 349; 2 *Stark.* 349. So where a person, who acted as clerk to parish officers, at a yearly salary voted by the vestry, was charged with embezzlement, as clerk to such officers, no objection was taken. *Tyers' case*, *Russ. & Ry.* 402. And an extra collector of poor-rates, paid out of the parish funds by a per centage, was held by Richardson, J., to be the clerk of the churchwardens and overseers, so as to support an indictment for embezzlement. *Ward's case*, *Gow.* 168. The treasurer to the guardians of the poor of Birmingham, appointed under the 1 & 2 Wm. 4, c. 67 (local and personal), is the servant of the guardians. *Welch's case*, 1 *Den. C. C. R.* 199.

On an indictment against the clerk of a savings' bank, the judges held that he was properly described as a clerk to the trustees, although elected by the managers. *Jenson's case*, 1 *Moo. C. C.* 434. So on an indictment for embezzlement, a collector of poor and other rates in the parish of St. Paul, Covent Garden, was held by Vaughan and Patteson, JJ., to be rightly described under a local act (10 Geo. 4, c. lxviii), as servant to the committee of management of the affairs of the parish, though he was elected by the vestrymen of the parish. *Callahan's case*, 8 *C. & P.* 154. An assistant overseer, appointed and paid a salary by the guardians of a poor-law union, is not the servant of the overseers. *Townsend's case*, 1 *Den. C. C. R.* 167. The prisoner was employed by the overseers of a parish to collect poor-rates on their account. As their agent he demanded the amount of a rate from the landlord of a house, who usually paid his tenant's poor-rates; but he entered the amount in his book as uncollected, and as legally excused, and appropriated the money. It was held, that, although the overseers might not have been able to enforce the payment of the sum so embezzled, the prisoner received it in virtue of his employment, and on account of his employers, and that it was not necessary to lay the money as the joint property of the churchwardens and overseers. *Adey's case*, 1 *Den. C. C. R.* 571; *S. C.* 19 *L. J. M. C.* 149. W. engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should, day by day, duly account for and deliver to the company's coal manager all moneys received from customers in payment of coals. The delivery-notes and receipted invoices of the coals were handed to W.'s carmen by the company's officers. The delivery-notes were entered by W. in his book, and the receipted invoices given to the customers. The prisoner was a servant of W., and was employed by him in the delivery of coals of the company. It was the prisoner's duty to pay over direct to the clerk of the company any money he might receive from customers. Such moneys never formed items of account between W. and the company. The prisoner

appropriated to his own use a sum of money which he had thus received in payment of some of the company's coals, delivered by him as servant of W. It was held by a majority of the judges, that these facts showed that such a privity existed between the prisoner and the company, as to make the latter the company's agent to receive the money, and to pay it over to them; that the money could not be considered as money received on account of W., but on account of the company, and, consequently, that the prisoner could not be indicted as W.'s servant for embezzling W.'s money. *Beaumont's case*, 1 *Dears. C. C. R.* 270; *S. C.* 23 *L. J. M. C.* 54. See also *Bayley's case*, 5 *Weekly Reporter* (Mich. Term, 1865), p. 48. So it was held by the judges that it was embezzlement in a member of and secretary to a society, fraudulently to withhold money received from a member to be paid over to the trustees, and that he might be stated to be the clerk and servant to the trustees, and that the money was properly described as their property, although the society was not enrolled, and though the money in the ordinary course ought to have been received by a steward. *Hall's case*, 1 *Moo. C. C.* 474. So it is embezzlement in the clerk of a friendly society fraudulently to withhold the rents of a house collected in the course of his duty as clerk; and he may be laid to be the clerk or servant of the trustees to whom the house was conveyed, if appointed, either by them or the society. It is no defence that the business of the society has not been conducted according to the statute. *Reg.* v *Miller*, 2 *Moo. C. C.* 249.

But where a society in consequence of administering to its members an unlawful oath was an unlawful combination and confederacy under the statutes 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo. 3, c. 19; it was held by Mirehouse, C. S., (after consulting Bosanquet and Coleridge, JJ.,) that a person charged with embezzlement as clerk and servant to such society could not be convicted. *Hunt's case*, 8 *C. & P.* 642.

Proof of being a person employed for the purpose or in the capacity of a clerk or servant within the statute.] It is sufficient, if it be shown that the prisoner was a person employed, for the purpose or in the capacity of a clerk or servant. The casually procuring a person to receive a sum of money will not render that person "a person employed for the purpose, or in the capacity of a clerk or servant." The prisoner was schoolmaster of a charity-school. His appointment was by a committee, of which the prosecutor was treasurer. There was a regular collector to receive the subscriptions to the school. The duty of the prisoner was only to teach the scholars. The prosecutor had been accustomed himself to receive a voluntary contribution to the school, but being confined to his bed, he left a written direction for the prisoner to receive it. This was not the order of the committee. The prisoner received, and did not account for the money. Being convicted of embezzlement, the judges, on a case reserved, were unanimously of opinion that the conviction was wrong, inasmuch as the prisoner did not stand in such a relation to the prosecutor, or the committee, as to bring him within the act 7 & 8 Geo, 4, c. 29. *Nettleton's case*, 1 *Moo. C. C.* 259. So where the prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a *roundsman*, for a day at a time, and had been sent several times by him to the bank for money; but, upon the day in question, was not working for the prosecutor, and was sent to the bank for money, receiving sixpence for his trouble; he having applied

the money to his own use, and being indicted for embezzling it, it was held by Park, J. (after conferring with Taunton, J.), that the prisoner was not a servant of the prosecutor within the meaning of the act of parliament, and that it was no embezzlement. *Freeman's case*, 8 *C. & P.* 534. The clerk of a chapelry, who receives the sacrament money, is not the servant either of the curate or of the chapelwardens, or of the poor of the township, so as to render a retaining of part of the money collected by him embezzlement. *Burton's case*, 1 *Moo. C. C.* 237. A person was chosen and sworn in, at a court-leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration), were to collect moneys from the commoners and other persons using the commonable lands; to employ the moneys so received, in keeping the lands in order; to account, at the end of the year, to two aldermen of the corporation; and to pay over any balance in his hands to his successor in office. In an action for accusing this person of felonious embezzlement, it was held by the court of Exchequer that the plaintiff was not a clerk or servant within the 7 & 8 Geo. 4, c. 29, s. 47. Mr. Baron Bayley said, "It appears to me that the statutory provision was intended to embrace persons of a very different description from the plaintiff. From the whole of that provision, it seems to me to have been intended to apply to persons in the ordinary situation of clerks or servants, and having masters to whom they are accountable for the discharge of the duties of their situation. Now, in the present case, is the plaintiff in that situation? and who are his masters? From the evidence, it appears that he was not nominated by the corporation or commoners, but was appointed to the post of chamberlain at a court-leet. And how can it be said that the corporation or the commoners are his masters, when he does not derive his authority from them?" He then distinguished this case from those of *Squires* and *Tyers* (*ante*, p. 424), and thus proceeded:—"In the present case, I think that the plaintiff does not come within the fair meaning of the statute; he is not the servant of another; he fills an office of his own; he does not receive money in the course of his employment as the mere agent of another; but appears to be entitled, by virtue of his office, to keep the money in his own hands, until the end of the year for which he is appointed." *Williams* v. *Stott*, 1 *C. R. & M.* 675.

It was held, on a case reserved, that a clerk to a joint-stock banking company, established under the 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company notwithstanding he is a shareholder. *R.* v. *Atkinson*, *Carr. & M.* 525; 2 *Moo. C. C.* 278.

Proof of the chattel, money, &c. embezzled.] The chattel, money, or valuable security embezzled by the prisoner must be such as has not come to the possession of his master; if it has come to his possession, the offence is larceny, and not embezzlement. The prisoner received a sum of money from her master to pay his taxes and poor-rates, but did not pay the same; being indicted and convicted of having embezzled the money, on a case reserved, the judges held the conviction wrong. *R.* v. *Elizabeth Smith*, *Russ. & Ry.* 267; 2 *Russ. by Grea.* 180. In a later case the indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzled the same; and upon the evidence, it appeared, that having 2*s.* 6*d.* of his master's money, to pay an account of his master, he only paid one shilling and sixpence, and converted the

other shilling to his own use; upon which Park, J., directed the jury to acquit the prisoner. *R.* v. *Peck*, 2 *Russ. by Grea.* 180. The prisoner, a clerk in the employment of A., received from another clerk, 3*l.* of A.'s money, that he might (amongst other things,) pay for inserting an advertisement in the gazette. The prisoner paid 10*s.* for the insertion, and charged 20*s.* for the same, fraudulently keeping back the difference. The prisoner having been convicted of embezzlement, on a case reserved, the judges thought the offence not within the statute, because A. had had possession of the money, by the hands of his other clerk, and they thereupon held the conviction wrong. *John Murray's case*, 1 *Moo. C. C.* 276; 5 *C. & P.* 145.

But where money is received on account of his master by one servant, and by him handed over in due course of business to another clerk, the prisoner, to be delivered to the master, but the prisoner fraudulently appropriated it; it was held that this was embezzlement. *Masters's case*, 1 *Den. C. C. R.* 332. "In *Murray's case*," said Pollock, C. B., "the case was not within the statute, because the master had had possession of the money by the hands of another servant: and when it was given away to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master: the fraudulent appropriation of it, being thus a tortuous taking in the first instance, was not embezzlement but larceny. But here the money never reached the master at all: it was stopped by the prisoner on its way to him. The original taking was lawful, and therefore the fraudulent appropriation was embezzlement." In a subsequent case, it appeared that the prisoner having been entrusted by his master with a number of articles of soldiers' clothing for the purpose of selling them, and ten pounds in silver to enable him to give change, sailed in a ship for the coast of Africa, having before his departure written to his master to say that he would send the account, together with a remittance, from Madeira: it was held that he could not be convicted of embezzlement, having received the goods and money from his master himself. *Hawkins's case*, 1 *Den. C. C. R.* 584.

Where a servant, who was sent by his master to get change for a 5*l.* note, appropriated the change to his own use, it was held by the judges, that as the master never had possession of the change, but by the hands of the prisoner, this was embezzlement and not larceny. *Sullen's case*, 1 *Moo. C. C.* 129; where the master's goods are sold without his authority, and their price embezzled, the statute does not apply. *Reg.* v. *Wilson*, 9 *C. & P.* 27.

In the following case, although the money had been in the possession of the master, and was at the time, in construction of law, still in his possession, the offence was, notwithstanding, held to be embezzlement. The prosecutors suspecting that the prisoner, their servant, had embezzled their money, desired a neighbour to go to their shop and purchase some articles, and they supplied him with three shillings of their own money, which they had marked for the purpose. The neighbour went to the shop, bought the articles, and paid the prisoner for them with the three shillings, which he embezzled. It was contended for the prisoner that the money was already in the master's possession, and that the offence, therefore, was not embezzlement. The prisoner being convicted, on a case reserved, the judges held the conviction right. *Hedge's case, Russ. & Ry.* 160; 2 *Leach*, 1033; *acc. Gill's case*, 1 *Dears. C. C. R.* 289; *S. C.* 23 *L. J. M. C.* 50.

Some difficulty formerly arose upon indictments under the 39 Geo. 3,

with regard to the money which should be deemed to be embezzled, where the prisoner had received several sums on the same day, and had not accounted for some. The prisoner received on account of his masters 18*l.* in one pound notes; he immediately entered in the books of his employers 12*l.* only as received, and accounted to them only for that sum. In the course of the same day he received 104*l.* on their account, which he paid over to them that evening with the 12*l.* It was urged for the prisoner that this money might have included all the 18*l.* in one pound notes, and if so, he could not be said to have embezzled any of them. The prisoner being convicted, on a case reserved, nine of the judges held the conviction right, being of opinion, that from the time of making the false entry, it was an embezzlement. Wood, B., doubted whether it could be considered an embezzlement, and Abbott, C. J., thought that the point should have been left to the jury, and that the conviction was wrong. *Hall's case, Russ. & Ry.* 463; 3 *Stark.* 67.

The halves of country bank-notes may be described as "chattels," within the statute. *Mead's case*, 4 *C. & P.* 535. But upon a charge of embezzling so many pounds, it is not sufficient to prove an embezzlement of the same number of bank-notes to the same amount. *Lindsey's case*, 3 *Chetw. Burn.* 189. A bank post bill cannot be described as a bill of exchange. *Moor's case*, 1 *Lewin, C. C.* 90.

It was held upon the statute 39 Geo. 3, that the indictment ought to set out specially some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of *one pound eleven shillings*, and it did not appear whether the sum was paid by a one pound note and eleven shillings in silver, or by two notes of one pound each, or by a two pound note, and change given by the prisoner; on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some articles of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong. *Furneaux's case, Russ & Ry.* 335; *Tyers' case, id.* 402. But now by the 7 & 8 Geo. 4, c. 29, s. 48, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin, or valuable security, and such allegation so far as it regards the description of property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved.

It was the duty of the prisoner, who was a banker's clerk, to receive money and to put it either into a box or a till, of each of which he kept the key, and to make entries of his receipts in a book; the balance of each evening being the first item with which he debited himself in the book the next morning. On the morning of the day in question he had thus debited himself with 1762*l.* and at the close of business on the latter day, he made the balance in the "money book" 1309*l.* On being called upon in the evening by one of his employers to produce his money, he threw himself upon his employers' mercy, saying he was about 900*l.* short. On examination it was found that the prisoner, instead of having 1309*l.* had only 345*l.* making the actual deficiency 964*l.* The jury having found the prisoner guilty, upon an indictment of embezzling "money to a large amount, to wit, 500*l.*;" a majority of the judges (eight to seven) after very considerable doubts, were of opinion that there was sufficient evidence to go to the jury, of the prisoner having received certain moneys on a particular

day, and for them to find he had embezzled the sum mentioned in the indictment. *Grove's case*, 7 *C. & P.* 635; 1 *Moo. C. C.* 447. But in a more recent case, Alderson, B., after stating that the determination in the above case proceeded more upon the particular facts than upon the law, said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." *Jones's case*, 8 *C. & P.* 288. It was the duty of a clerk to receive money for his employer, and pay wages out of it, to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over his balances to his employer. Having entries of weekly payments in his first book, amounting to 25*l.*, he entered them in the second book as 35*l.*; and two months after, in accounting with his employer, by these means made his balance 10*l.* too little, and paid it over accordingly. William, J., held that the clerk could not, on these facts, be convicted of embezzlement, without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of that sum to his own use. *Reg.* v. *Chapman*, 1 *C. & K.* 119.

It is not necessary that the exact amount or value of the thing embezzled should be stated. *Carson's case*, *R. & R.* 303.

Proof of the embezzlement.] The fact of embezzlement by the prisoner must be proved as charged. It is not sufficient to show a bare non-payment. Thus, where a master gave his servant money to pay taxes, and the only evidence of embezzlement was, that the collector had never received the money, the prisoner being convicted of embezzlement, the judges held the conviction wrong, upon the ground that there was not sufficient evidence of the prisoner having embezzled the money; the fact of not having paid the money over to the collector not being evidence of actual embezzlement, but only negativing the application of the money in the manner directed. *Eliz. Smith's case*, *Russ. & Ry.* 267. The prisoner was clerk to the proprietors of a mail coach, and it was his duty to receive money for passengers and parcels, to enter the sums in a book, and to remit the amount weekly to his employers. He was indicted for embezzling some of the moneys thus received; and it appeared that he had entered all the sums in the book, and had made no false entry, but it was imputed to him that he had not forwarded the sums in question to his employers, according to his duty; Vaughan, B., said, "this is no embezzlement, it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony, it is only matter of account." *Hodgson's case*, 3 *C. & P.* 423. So where it appeared by the books of a clerk, that he had received much more than he had paid away, and from this the prosecutors wished it to be inferred that he must have embezzled some particular note or piece of money; Garrow, B., held that this was not enough, and that it was necessary to prove that some distinct act of embezzlement had been committed. *Hebb's case*, 2 *Russell*, 1242, 1*st ed.* So Bolland, B., held that it was not enough to prove that a clerk had received a sum of money, and not entered it in his books, unless there was also evidence that he had denied the receipt of it, or the like. *Jones's case*, 7 *C. & P.* 833. On a second indictment against the same prisoner, it appeared that one E. owed

the prosecutor 5*l.*, and that he paid the prisoner 3*l.* 14*s.* 6*d.* in cash, 1*s.* 6*d.* being allowed for discount, and the remaining 1*l.* 4*s.* being set against an account due from the prisoner to E. The prisoner had credited E. in the ledger to the amount of 5*l.*, and had entered 3*l.* 14*s.* 6*d.* in the cash book. The prosecutor had never called the prisoner to account with respect to the sum of 5*l.* Bolland, B., held that this did not amount to embezzlement, observing, "In cases of this sort, the thing alleged to be embezzled should not be laid out of the question. If goods are taken an intent may more clearly appear than in the case of money, as the same pieces of coin may, in many cases, not be paid over." *Ib.* 834. See also *Lister's case*, 5 *Weekly Reporter*, 50 (*Mich. Term*, 1856).

In general the act of embezzlement cannot be said to take place until the party who has received the money refuses to account, or falsely accounts for it. When the prisoner received the money in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted for the embezzlement in the former county. On a case reserved, the conviction was held right. Lawrence, J., thought that embezzlement being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion, that the indictment might be in Shropshire, where the prisoner received the money, as well as in Staffordshire, where he *embezzled it*, by *not accounting for it to his master*; that the statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might, therefore, be indicted in that or in any other county into which he carried the property. *Hobson's case*, 1 *East*, *P. C. Add.* xxiv.; *Russ. & Ry.* 56. The doctrine, that the not accounting is the evidence of the embezzlement, was also laid down in the following case. The prisoner was indicted for embezzling money in Middlesex. It appeared that he received the money in Surrey, and returning into Middlesex, denied to his master the receipt of the money. It was objected that he ought to have been indicted in Surrey, and the point was reserved. Lord Alvanley, delivering the opinion of the judges, after referring to the last case, said, "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money until he had returned into the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pass them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, *until he is called upon by the master to account*. When so called upon, he denied that he had ever received it. That was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money. There was no evidence of the prisoner having done any act to embezzle in the

county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, *until he refused* to account to his master." *William Taylor's case*, 3 *Bos. & Pul.* 596; 2 *Leach*, 974; *Russ. & Ry.* 63. So in *Hall's case*, *Russ. & Ry.* 463; *ante*, p. 428, the judges were of opinion, that from the time of *making the false entry* it was embezzlement. The prisoner was a travelling salesman, whose duty it was to go into Derbyshire every Monday to sell goods and receive money for them there, and return with it to his master in Nottinghamshire every Saturday. He received two sums of money for his master, in Derbyshire, but never returned to render any account of them. Two months afterwards he was met by his master in Nottinghamshire, who asked him what he had done with the money, and the prisoner said he was sorry for what he had done: he had spent it. It was held, under these circumstances, that the prisoner was rightly indicted in Nottinghamshire, there being some evidence to go to the jury of an embezzlement in that county. *Murdock's case*, 2 *Den. C. C. R.* 298; *S. C.* 21 *L. J. M. C.* 22.

Upon an indictment for embezzlement, it appeared that the prosecutors were owners of a vessel, and the prisoner was in their service as the master. The vessel carried culm from Swansea to Plymouth, which, when weighed at Plymouth, weighed 215 tons, and the prisoner received payment for the freight accordingly. When he was asked for his account by the owner, he delivered a statement, acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and Plymouth, and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight, or of the custom. Cresswell, J., held that this did not amount to embezzlement. Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant, of his having appropriated the money. If instead of his denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage at Swansea and at Plymouth, or that there was no such custom as that set up, it would not amount to embezzlement. *Reg.* v. *Norman*, *Carr. & M.* 501. So if a person, whose duty it is to receive money for his employer, receive money, and render a true account of all the money he has received, he is not guilty of embezzlement, although he afterwards absconds and does not pay over the money; but if he had received the money, and had rendered an account in which it was omitted, that would have been evidence to show that he had embezzled the amount. *Per Erskine, J.*; *R.* v. *Creed*, 1 *C. & K.* 63. But where the prisoner was sent to receive money due to her master, and on receiving it went went off to Ireland, Coleridge, J., held that the circumstance of the prisoner having quitted her place, and gone off to Ireland, was evidence from which the jury might infer that she intended to embezzle the money. The prisoner was convicted. *Sarah Williams's case*, 7 *C. & P.* 338. It was the duty of a servant to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer,

and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums, nor paid them over: he never denied the receipt of them, or rendered any written account in which they were omitted. Coleridge, J., held, that if the servant wilfully omitted to account for these sums and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them. *Reg.* v. *Jackson*, 1 *C. & K.* 384.

Before the 7 & 8 Geo. 4, c. 29, evidence of one act of embezzlement only could be given upon one indictment, and thus the full case upon which the master had determined to prosecute, was frequently prevented from being brought forward. See 2 *Russ. by Grea.* 168. To remedy this inconvenience that statute enacts, that the prosecutor may include in the indictment any number of distinct acts of embezzlement, not exceeding three, committed against himself, within the space of six months from the first to the last of such acts.

Where the indictment contains only one count for one act of embezzlement, and it appears in evidence that the prisoner received money in different sums on different days, the prosecutor must elect one sum and one day upon which to proceed. *Williams's case*, 6 *C. & P.* 626.

A count containing three charges of embezzlement, and not alleging that the three sums were embezzled within six calendar months, is bad. *Reg.* v. *Purchase*, 2 *Russ. by Grea.* 188, *Carr. & M.* 617.

Particulars of the embezzlement.] It is not necessary to state in the indictment from whom the money, &c. was received. *Beacall's case*, 1 *C. & P.* 454; but the judge before whom the indictment is found, will order the prosecutor to furnish the prisoner with a particular of the charges, upon the prisoner making an affidavit that he is unacquainted with the charges, and that he has applied to the prosecutor for a particular, which has been refused. *Bootyman's case*, 5 *C. & P.* 300. Where three acts of embezzlement were stated in the indictment, the prisoner moved, upon affidavit, for an order directing the prosecutor to furnish a particular of the charges. Notice of the motion had been given. Vaughan, B., to whom the application was made, said, "I think you ought to apply to the other side to furnish you with a particular, and if they refuse, I will grant an order. The clause of the 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, causes great hardship to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach-office, he must have received money from many hundred persons. I should, therefore, recommend the prisoner's attorney to apply to the prosecutor for a particular; and I think that the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial." *Hodgson's case*, 3 *C. & P.* 422. See also 1 *Chitty Rep.* 698.

BY PERSONS EMPLOYED IN THE PUBLIC SERVICE.

By 2 Wm. 4, c. 4, s. 1 (U.K.), (repealing so much of the 50 Geo. 3, c. 59, as relates to embezzlement by persons to whom any money or

securities for money shall be issued for the public service), it is enacted, that "if any person employed in the public service of his Majesty and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed to have stolen the same, and shall in England and Ireland be deemed guilty of felony, and in Scotland of a high crime and offence, and on being thereof convicted in due form of law, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned, with or without hard labour, as to the court shall seem meet, for any term not exceeding three years."

An indictment under this section against a clerk in a public office for embezzlement of moneys received by virtue of his employment as such clerk, is good, without alleging the embezzlement to have taken place whilst the prisoner was clerk. *Lovell's case*, 2 *Moo. & R.* 236. See *Moah's case*, 25 *L. J. M. C.* 66; in which case the above section is explained by the judges.

By s. 2, "every tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company, or society, or to any deposits in any savings-bank; and every debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money, whether of this kingdom or of any foreign state; and every warrant or order for the delivery or transfer of any goods or valuable thing, shall, throughout this act, be deemed for every purpose, to be included under and denoted by the words 'valuable security;' and that if any person so employed and intrusted as aforesaid shall embezzle, or fraudulently apply, or dispose of any such valuable security as aforesaid, he shall be deemed to have stolen the same, within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest or deposit, to which such security may relate, or with the money due on such security, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security."

By s. 3, "it shall be lawful to charge in the indictment to be preferred against any offender under this act, and to proceed against him for any number of distinct acts of embezzlement, or of fraudulent application or disposition, as aforesaid, not exceeding three, which may have been committed by him within the space of six calendar months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as it regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed, shall not be proved,

or if he shall be proved to have embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, and although such part shall have been returned accordingly."

By s. 4., "in every such case of embezzlement, or fraudulent application or disposition, as aforesaid, of any chattel, money, or valuable security, it shall be lawful, in the order of committal by the justice of the peace, before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security, as aforesaid, in the king's majesty."

As to embezzlement by persons in the post-office, see that title.

BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND.

By 15 Geo. 2, c. 13, s. 12, it is enacted, that if any officer or servant of the said company, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said company, or with him as an officer, or servant of the said company, shall secrete, embezzle, or run away with, any such note, bill, dividend warrant, bond, deed, security, money, or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony [and shall suffer death as a felon, without benefit of clergy].

The punishment pursuant to the 4 & 5 Vict. c. 56, ss. 1, 4, is altered to transportation for life, or not less than seven years; or imprisonment for any term not exceeding three years, with or without hard labour, and with or without solitary confinement.

Provisions similar to the above are contained in the 35 Geo. 3, c. 66, s. 6, and 37 Geo. 3, c. 46, s. 4. The 24 Geo. 2, c. 11, also contains a clause (s. 3,) to the same effect, with respect to officers and servants of the South Sea Company. The punishment for offences under these statutes is now also pursuant to the 4 and 5 Vict. c. 56, ss. 1, 4.

The corresponding statutes relating to embezzlement by officers and servants of the Bank of Ireland are the 21 & 22 Geo. 3, c. 16, s. 16, and, as to the punishment, the 5 Vict. st. 2, c. 28, s. 4.

Upon a prosecution under the 15 Geo. 2, c. 13, the prosecutor must prove, 1st, that the prisoner was an officer or servant of the bank of England, intrusted with a note, &c. belonging to the bank, or having a bill, &c. deposited with the bank, or with him; and 2nd, that he embezzled, or ran away with the same.

Proof of being an officer, &c. intrusted, &c.] It is not sufficient, in order to bring a party within the statute, that he should be an officer of the bank, and as such *have access* to the document in question. It must appear also that he was *intrusted* with it. A bank clerk, employed to post into the ledger, and read from the cash-book, bank-notes in value from 100*l*, to 1000*l*., and who, in the course of that occupation, had, with other clerks, access to a file upon which *paid notes* of every description were filed, took from the file a paid bank-

note for 50*l.* Being indicted for this, under the stat. 15 Geo. 2, c. 13, s. 12, it was contended that he was not *intrusted* with this note, within the statute, the only notes with which he could be said to be intrusted being those between 100*l.* and 1000*l.* Having been found guilty, the judges held the conviction wrong, on the ground that it did not appear that he was *intrusted* with the cancelled note, though he had *access* to it. *Bakewell's case, Russ. & Ry.* 35.

Proof of the bills, &c.] Where the prisoner was charged with embezzling "certain bills, commonly called exchequer-bills," and it appeared that the bills had been signed by a person not legally authorised to sign them, it was held that the prisoner could not be convicted. *Aslett's (first) case*, 2 *Leach*, 954. The prisoner was again indicted under the same statute, for embezzling "certain effects" of the bank, and being convicted, the judges, on a case reserved, were of opinion that these bills or papers were *effects* within the statute; for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment. *Aslett's (second) case, Russ. & Ry.* 67; 2 *Leach*, 958, 1 *N. R.* 1. In this case, the judges likewise held that the stat. 39 Geo. 3. c. 85, had not repealed any part of the 15 Geo. 2, c. 13.

BY BANKERS, AGENTS, OR FACTORS.

The offence of embezzlement by bankers and other persons, intrusted with money, was provided against by the statute 52 Geo. 3, c. 63; but that statute is now repealed by the 7 & 8 Geo. 4, c. 27; and its provisions are in substance re-enacted by the 7 & 8 Geo. 4, c. 29, (E.), s. 49, which enacts, "that if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction *in writing* to apply such money, or any part thereof, or the proceeds, or any part of the proceeds, of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine and imprisonment, or by both, (such imprisonment with or without hard labour, and with or without solitary confinement, s. 4), as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same or any part thereof, or the share or interest

in the stock or fund to which such power of attorney shall relate, or any part thereof. every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments, which the court may award, as herein-before last mentioned, (same stat. s. 46)" [transportation for any term not exceeding fourteen years, nor less than seven years, or imprisonment for not more than three years; such imprisonment with or without hard labour, and with or without solitary confinement, s. 4].

The above section does not touch the case of trustees and mortgagees, who are expressly excluded from its operation by the succeeding section (50); by which it is provided and enacted, "that nothing hereinbefore contained relating to agents shall affect any trustee, in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

The 51st section of the same statute relates to embezzlements by factors, or agents intrusted for the purpose of sale with any goods, &c. It enacts, "that if any factor or agent intrusted, for the purpose of sale, with any goods or merchandize, or intrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent."

The above provisions are not to extend to deprive parties of any remedies which they possessed before their enactment, according to the 52nd section of the same statute, by which it is provided and enacted, "that nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any

banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law, or in equity, which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time, previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

Under this section it would appear that a disclosure of any illegal act to which the statute relates must, to be rendered available as a protection, be made *bonâ fide*, and must not be a mere voluntary statement made for the express purpose of screening the person making it from the consequences of his acts. *Strahan's case*, 7 *Cox*, *C. C.* 85.

The corresponding statute law for Ireland is to be found in the 9 Geo. 4, c. 55, ss. 42, 43, 44, 45.

Upon a prosecution against a banker or agent under these statutes, the prosecutor must prove—1, the defendant's character of banker or agent; 2, the intrusting him with money, or security for money; 3, the directions in writing for the application of the same; and 4, the conversion of the same in violation of good faith, and contrary to the purpose specified.

The purpose specified is matter of description, and must therefore be proved as laid. Thus, an allegation that the prosecutor directed the defendant to invest the proceeds of certain valuable securities in the funds, is not proved by evidence of a direction to invest them in the funds, in the event of an unexpected accident occurring. *White's case*, 4 *C. & P.* 46.

An indictment on the 7 & 8 Geo. 4, c. 29, s. 49, against a broker for embezzlement of a security for money, must allege a written direction to him as to the application of the proceeds. *Reg.* v. *Golde*, 2 *Moo. & R.* 425.

EMBEZZLEMENTS OF MINOR IMPORTANCE.

Statutory provisions are made in cases of various embezzlements, a few of which it will be sufficient to notice briefly in this place.

Embezzling naval or military stores.] By the 4 Geo. 4, c. 53, every person who shall be lawfully convicted of stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding or abetting any such offender, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, for any term not exceeding seven years. This statute does not seem to extend to Ireland. 1 *Gabb. Crim. Law of Ireland*, 632. See also the 9 & 10 Wm. 3, c. 41, and 39 and 40 Geo. 3, c. 89, extended to Ireland by the 52 Geo. 3, c. 12. By the annual mutiny

acts, persons employed in the care of military stores embezzling the same, may be tried by a court-martial and transported for life, or for any less term of years; or fined or imprisoned.

Embezzling warehoused goods.] By the 3 and 4 Wm. 4, c. 57, s. 41, it is enacted, "that if it shall at any time happen that any embezzlement, waste, spoil, or destruction shall be made, of or in any goods or merchandize, which shall be warehoused in warehouses under the authority of that act, by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be guilty of a misdemeanor, and shall, on conviction, suffer such punishment as may be inflicted by law in cases of misdemeanor."

Embezzlement by pensioners, &c. in Greenwich hospital.] The embezzlement by any pensioner or nurse of Greenwich hospital, of any clothes, &c. belonging to the hospital, is made punishable, by the 54 Geo. 3, c. 110, s. 1, by six months' imprisonment in the gaol of the town, &c. in which such pensioner, &c. shall be apprehended.

ESCAPE.

AN escape by a person in custody on a criminal charge may be either with or without force, or with or without the consent of the officer or other person who has him in custody.

Proof of escape by the party himself.] All persons are bound to submit themselves to the judgment of law, and therefore, if any one, being in custody, frees himself from it by any artifice, he is guilty of a high contempt, punishable by fine and imprisonment. 2 *Hawk. P. C. c.* 17, *s.* 5. And if by the consent or negligence of the gaoler, the prison doors are opened, and the prisoner escapes, without making use of any force or violence, he is guilty of a misdemeanor. *Id. c.* 18, *s.* 9; 1 *Hale, P. C.* 611; 1 *Russ. by Grea.* 416.

Proof of escape—party himself.] It is laid down that it must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence. 1 *Russ. by Grea.* 416: but in *Allan's case, Car. & M.* 295, Erskine and Wightman, JJ., held that to aid a person confined under the warrant of the Commissioners for the Relief of Insolvent Debtors to escape from custody, was a common law misdemeanor. *Post, title, Rescue.* Before the passing of the 4 Geo. 4, c. 64, (E.) it was decided that a certificate of the prisoner having been convicted, granted by the officer of the court, was not evidence. *R.* v. *Smith,* 1 *Russ. by Grea.* 417.

But now, by the 44th section of the above statute, it is enacted, "that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given

by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced."

A certificate under this statute should set forth the effect and substance of the conviction, and not merely state it to have been for felony. *Watson's case, R. & R.* 468.

Proof of escape suffered by an officer.] In order to render a person suffering an escape liable, as an officer, it must appear that he was a known officer of the law. Thus where the constable of the Tower committed a prisoner to the house of a warder of the Tower, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape. 1 *Chetw. Burn, Escape*, 930. But whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not. *Hawk. P. C. b.* 2, *c.* 19, *s.* 28.

It is said by Hawkins to be the better opinion that the sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. *Hawk. P. C. b.* 2, *c.* 19, *s.* 28; 1 *Hale, P. C.* 597; 1 *Russ by Grea.* 421. But this is opposed to the authority of Lord Holt, who says, that the sheriff is not answerable criminally for the acts of his bailiff. *Fell's case*, 1 *Salk.* 272; 1 *Lord Raym.* 424.

Proof of escape suffered by an officer—proof of arrest.] In case of a prosecution against an officer, either for a voluntary or negligent escape of a prisoner in custody for a criminal offence, it must appear that there was an actual arrest of the offender. Therefore where an officer, having a warrant to arrest a man, sees him in a house and challenges him to be his prisoner, but never actually has him in his custody, and the party gets free, the officer cannot be charged with the escape. 2 *Hawk. P. C. c.* 19, *s.* 1. See *Simpson* v. *Hill*, 1 *Esp.* 431.

Proof of arrest—must be justifiable.] The arrest must be justifiable in order to render the escape criminal; and it is laid down as a good rule, that whenever an imprisonment is so far irregular as that it is no offence in the prisoner to break from it by force, it will be no offence in the officer to suffer him to escape. 2 *Hawk. P. C. c.* 29, *s.* 2. A lawful imprisonment must also be continuing at the time of the escape; and therefore, if an officer suffers a criminal, who was acquitted and detained for his fees, to escape, it is not punishable. *Id. s.* 3, 4. Yet, if a person convicted of a crime be condemned to imprisonment for a certain time, and *also till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, because it was part of the punishment that the imprisonment should continue till the fees were paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler. *Id. s.* 4.

Proof of voluntary escape.] It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily

permitting an escape. The better opinion appears to be that the act must be done *malo animo*, with an intent to defeat the progress of justice. Thus it is said by Hawkins, that it seems agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; neither, he adds, is there any authority to support the opinion that the bailing of one who is not bailable, by a person who has no power to bail, must necessarily be esteemed a voluntary escape. And there are cases in which the officer has knowingly given his prisoner more liberty than he ought, as to go out of prison on promise to return; and yet this seems to have been adjudged to be only a negligent escape. The judgment to be made, adds Hawkins, of all offences of this kind must depend on the circumstances of the case; as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning, and the intention and motives of the officer. *Hawk. P. C. b.* 2, *c.* 19, *s.* 10; 1 *Russ. by Grea.* 419.

Proof of voluntary escape—retaking.] It is laid down in some books, that after a voluntary escape the officer cannot retake the prisoner by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 1 *Burn*, 930, *title, Escape*, citing *Dalt. c.* 169; 2 *Hawk. c.* 13, *s.* 9; 1 *Russ by Grea.* 421. But Hawkins observes, that the purport of the authorities seems to be no more than this, that a gaoler who has been fined for such an escape, shall not avoid the judgment by retaking the prisoner; and he adds, "I do not see how it can be collected from hence that he cannot justify the retaking him." *Hawk. P. C. b.* 2, *c.* 19, *s.* 12.

Proof of negligent escape.] A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrested or imprisoned him, and is not freshly pursued and taken before he is lost sight of. *Dalt. c.* 159; 1 *Chetw. Burn*, 930, *Escape.* Thus, if a thief suddenly, and without the assent of the constable, hang or drown himself, this is a negligent escape. *Id.* It is said by Lord Hale, that if a prisoner for felony breaks the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the goaler or his officers that should have prevented it. 1 *Hale*, 600. But upon this passage it has been remarked, that it may be submitted that it would be competent to a person charged with a negligent escape under such circumstances, to show that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 *Russ. by Grea.* 420.

Proof of negligent escape—retaking.] Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken, this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. It is scarcely necessary to add, that the sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing

him in such a pursuit. *Hawk. P. C. b.* 2, *c.* 19, *ss.* 12, 13; 1 *Hale, P. C.* 602.

Proof of escape from the custody of a private person.] The evidence upon an indictment against a private person, for the escape of a prisoner from his custody, will in general be the same as on an indictment against an officer. A private person may be guilty either of a voluntary or of a negligent escape, where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony (in which case the arrest is only justifiable if a felony be proved), yet he is punishable if he suffer the prisoner to escape. *Hawk. P. C. b.* 2, *c.* 20, *s.* 2. And if, in such case, he deliver over the prisoner to another private person, who permits the escape, both, it is said, are answerable. *Id.* But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. *Id. s.* 3; 1 *Russ. by Grea.* 425.

Punishment.] A negligent escape in an officer is punishable now by a fine imposed on the party, at the discretion of the court. 2 *Hawk. c.* 19, *s.* 31; 1 *Hale, P. C.* 600.

A voluntary escape in an officer amounts to the same kind of offence, and is punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. But the officer cannot be thus punished until after the original delinquent has been found guilty, or convicted; he may, however, before the conviction of the principal party, be fined and imprisoned for a misdemeanour. 2 *Hawk. c.* 19, *s.* 26; 1 *Hale,* 588, 589; 4 *Comm.* 130.

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. 2 *Hawk. c.* 20, *s.* 6.

As to escapes from Parkhurst prison, see the 1 & 2 Vict. c. 82, s. 53; from Pentonville prison, the 5 Vict. sess. 2, c. 29, ss. 24, 25; from Millbank prison, 6 & 7 Vict. c. 26, ss. 22, 23. For aiding escapes, see *post, tits. Prison Breach* and *Rescue.*

FALSE DECLARATIONS.

At elections—parliamentary.] By the Reform Act, 2 & 3 Wm. 4, c. 45, s. 58, three questions were allowed to be put to the voterat the poll, to be answered by him on oath; but by the 6 Vict. c. 18, ss. 81, 82, these were reduced to two. See *Rogers on Elections*, chap. *Proceedings at the Election.* Sec. 81 of the latter statute enacts, that "if any person shall wilfully make a false answer to either of the questions, he shall be deemed guilty of a misdemeanor, and shall and may be indicted and punished accordingly."

Upon an indictment under this statute the word "wilfully" should be construed in the same way as in an indictment for perjury, and be supported by the same sort of evidence. *Per Patteson, J., in Ellis's case, Car. & M.* 564. For other cases upon the 2 & 3 Wm. 4, c. 45, s. 58, see *Bowler's case, Car. & M.* 559; *Spalding's case, Car. & M.* 568; and *Lacy's case, Car. & M.* 511. See also *Bent's case*, 1 *Den. C. C. R.* 157, *infra.*

At elections—municipal.] The Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 34, provides likewise for questions being put to persons voting at municipal elections, and in the same words as those used in the 6 Vict. c. 18, makes it a misdemeanor for a burgess wilfully to make a false answer to any of these questions. It was held, that an indictment charging that "the defendant falsely and fraudulently answered" was bad for omitting the word "wilfully." *Bent's case*, 1 *Den. C. C. R.* 157.

Before magistrates.] The 5 & 6 Wm. 4, c. 62, s. 18, after reciting whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts or of the execution of deeds or other matters," enacts, that "it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorised to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the Schedule to this act annexed; and if any declaration so made shall be false and untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor."

Erskine, J., held, in *Boynes's case*, 1 *C. & K.* 65, that the enacting words of this section were not restrained by those in the preamble, so as to exclude from the operation of the statute a declaration by a member of a benefit society that he had sustained a loss by an accidental fire, it being a rule of such benefit society that any full free member thereof, who sustained a loss by an accidental fire was to be indemnified to the extent of 15*l.*, on making a declaration before a magistrate verifying his loss.

On registration of births, deaths, and marriages.] The statute 6 & 7 Wm. 4, c. 86, s. 41, enacts that "every person who shall wilfully make, or cause to be made for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury."

Sect. 43 enacts, that "every person who shall wilfully destroy or injure, or cause to be destroyed or injured any such register book, or any part or certified copy, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited any part of any such register book or certified copy thereof, or shall wilfully insert or cause to be inserted in any register book or certified copy thereof, any false entry of any birth, death, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony."

To support an indictment on the 41st section, for making a false statement touching the particulars required to be registered for the purpose of their being inserted in a register of marriages, it is essential that the false statement should have been made wilfully and intentionally and not by mistake only. *Lord Dunboyne's case*, 3 *C. & K.* 1, *per Campbell, C. J.*

To constitute an offence under this section it is not essential that the purpose for which the false declaration was made, should have been effected. *Per Cresswell, J.*, in *Mason's case*, 2 *C. & K.* 622. An indictment under this section charged that a clergyman had solemnised a marriage, and was about to register in duplicate the particulars relating to the marriage, and that the prisoner did wilfully make to the clergyman, for the purpose of being inserted in the register of marriage, certain false statements. The proof was that the particulars were entered by the clerk of the church before the marriage; that after the marriage the clergyman asked the prisoner if they were correct, and that he answered in the affirmative, and the clergyman signed the register. It was held, that the prisoner had been rightly convicted. *Brown's case*, 1 *Den. C. C. R.* 291; *S. C.* 17 *L. J. M. C.* 145. Upon such an indictment it is not necessary to prove that the marriage register book is the identical book directed to be furnished by the registrar-general under 6 & 7 Wm. 4, c. 86, s. 30.

It is a felony, under sect. 43, to cause the registrar to make an entirely false entry of a birth, marriage, or death. *Per Cresswell, J.*, *in Mason's case*, *supra.* Therefore, where a woman went to a registrar of births, and asked him to register the birth of a child, she stated to him the particulars necessary for the entry, and he made the entry accordingly, and she signed it as the person giving the

information; the same learned judge held, that this amounted to the felony of causing a false entry to be made within sect. 43, and was not merely the misdemeanor of making a false statement under sect. 41. *Dewitt's case*, 2 *C. & K.* 905.

Customs.] As to making false declarations in matters relating to the customs, see 16 & 17 Vict. c. 107, s. 198, and 18 & 19 Vict. c 96, s. 38.

FALSE PERSONATION.

Offence at common law.] The offence of falsely personating another for the purpose of fraud is a misdemeanor at common law, and punishable as such. 2 *East, P. C.* 1010; 2 *Russ. by Grea.* 539. In most cases of this kind, however, it is usual, where more than one are concerned in the offence, to proceed as for a conspiracy; and very few cases are to be found of prosecutions at common law for false personation. In one case, where the indictment merely charged that the prisoner personated one A. B., clerk to H. H., justice of the peace, with intent to extort money from several persons, in order to procure their discharge from certain misdemeanors, for which they stood committed, the court refused to quash the indictment on motion, but put the defendant to demur. *Dupee's case*, 2 *East, P. C.* 1010. It is observed by Mr. East, that it might probably have occurred to the court, that this was something more than a bare endeavour to commit a fraud by means of falsely personating another, for that it was an attempt to pollute public justice. *Ibid.*

Offence by statute.] In a variety of statutes against forgery, provisions are likewise contained against false personation, which in general is made felony. Thus personating the owner of stock, &c. is made felony, by 1 Wm. 4, c. 66, s. 7. *Vide post, tit. Forgery.*

Personating bail—acknowledging recovery, &c.] By the 1 Wm. 4, c. 66, s. 11, "if any person shall, before any court, judge, or other person lawfully authorised to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, whether such recognizance or bail in either case be or be not filed; or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery [now both abolished], *cognovit actionem*, or judgment, or any deed to be enrolled; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

The Irish statute similar to this is the 7 Wm. 4, c. 18, the punishment therein enacted being modified by the 2 & 3 Wm. 4, c. 123, and the 1 Vict. c. 84, s. 2.

False personation of soldiers and seamen.] The false personation of soldiers and seamen was made felony by several statutes, the provisions of which are now re-enacted in the 5 Geo. 4, c. 107. By the fifth section of which statute, reciting that, whereas it is expedient that the crime of personating and falsely assuming the name and character of any person entitled to prize money or pension, for the purpose of fraudulently receiving the same, shall no longer be punished with death, it is enacted, that, from and after the passing of that act, "whosoever shall willingly and knowingly personate or falsely assume the name or character of any officer, soldier, seaman, marine, or other person entitled, or supposed to be entitled to any wages, pay, pension, prize money, or other allowance of money for service done in his Majesty's army or navy, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer or soldier, seamen, marine, or other person in order fraudulently to receive any wages, pay, pension, prize money, or other allowances of money due, or supposed to be due, for or on account of the services of any such officer or soldier, seaman or marine, or other person, every such person, being thereof convicted, shall be liable at the discretion of the court, to be transported beyond seas for life, or for any term of years not less than seven, or to be imprisoned only, or imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years." (See also the 10 Geo. 4, c. 26 (U. K.), the 11 Geo. 4 and 1 Wm. 4, c. 20, s. 84 (U. K.), and the 2 Wm. 4, c. 53, s. 59.)

The statute 5 Geo. 4, c. 107, as well as the former statutes, makes use of the words "some officer," &c., "entitled, or supposed to be entitled," &c. Upon a prosecution, therefore, for such false personation there must be some evidence to show that there was some person of the name and character assumed, who was either entitled, or might, *primâ facie* at least, be supposed to be entitled, to the wages attempted to be acquired. *Brown's case*, 2 *East, P. C.* 1007. Where the prisoner was indicted for personating and falsely assuming the character of Peter M'Cann, a seaman on board the *Tremendous*, and it appeared in evidence that there had been a seaman of the name of M'Carn on board the vessel, but no one of the name of M'Cann; the prisoner being convicted, the judges held the conviction wrong. They were of opinion that "personating" must apply to some person who had belonged to the ship, and that the indictment must charge the personating of some such person. *Tannet's case, Russ. & Ry.* 351.

It has been held that the offence is the same, though the seaman personated was dead at the time of the offence committed. *Martin's case, Russ. & Ry.* 324; *Cramp's case, Id.* 327.

Under the 57 Geo. 3, c. 127, it has been held, that all persons present aiding and abetting a person in personating a seaman, are principals in the offence. *Pott's case, Russ. & Ry.* 353.

False personation of voters.] To falsely personate a burgess at an election of a town-councillor is no offence at common law, or under the 5 & 6 Wm. 4 c. 76. *Thompson's case*, 1 *Den. C. C. R.* 355. But the personation of a voter at an election for a member of parliament is now made a misdemeanor by the 6 Vict. c. 18, s. 73.

FALSE PRETENCES.

Statutory provision.] By the 7 & 8 Geo. 4, c. 29, s. 53, reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud, for remedy thereof it is enacted, "that if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award: provided always, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, and no such indictment shall be removable by *certiorari;* and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

The forty-sixth section of the Irish statute, the 9 Geo. 4, c. 55, is the same as the above enactment.

As many of the cases hereafter cited were determined upon the repealed statute 30 Geo. 2, c. 24, it will be useful to give the words of that act, which, after reciting that evil-disposed persons had, by various subtle stratagems, &c., fraudulently obtained various sums of money, goods, &c., to the great injury of industrious families, and to the manifest injury of trade and credit, enacted, that all persons who, knowingly and designedly, by false pretence or pretences should obtain from any person or persons, money, goods, wares, or merchandises,

with intent to cheat or defraud any person or persons of the same, should be deemed offenders against law and the public peace, and should be punished, &c.

The ingredients of the offence are, the obtaining of money, &c., by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient, and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used to effect it, it brings the case within the statute. *Per Buller, J., Young's case*, 3 *T. R.* 98.

"There must be a knowingly false statement of a supposed by-gone or existing fact made with intent to defraud, and an obtaining of the money by means of that representation." *Per Jervis, C. J., in Welman's case*, 22 *L. J. M. C.* 120.

In *Joseph Ady's case*, 7 *C. & P.* 140, where for the defence an endeavour was made to show that the prosecutor and his friend went to the defendant, well knowing who he was, for the purpose of making evidence to support a case against him; Patteson, J., is reported to have said, "If the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not." It did not appear in the above case, that the prosecutor had gone with any such intention; and he swore that he was induced to part with his money through the representations of the defendant, which he stated he believed. As in order to support the charge it must be shown, that the prosecutor parted with his property by reason of some false pretence used by the prisoner, there seems a difficulty in saying, where a person does not believe the pretence alleged, but parts with his property in order to establish a case against the defendant, that the offence is committed.

Where goods are obtained under a false representation, but that representation is in writing, and amounts to a warrant or order for the delivery of goods within the stat. 1 Wm. 4, c. 66, s. 10, it is a forgery, and the offender must be indicted for it as such, and cannot be convicted of obtaining the goods under false pretences. Thus where, upon an indictment for obtaining goods by false pretences, it appeared that the prisoner had procured them under the following forged order:—

"Mr. B.—Please to let the bearer have, for J. R., four yards of Irish linen. J. R."

Taunton, J., directed the prisoner to be acquitted, saying that the offence was a felony, and not a misdemeanor. *Evans's case*, 5 *C. & P.* 553. *Sed quære* as to this being a forgery. See *Anderson's case, post*, p. 456, and *post, tit. Forgery.*

The cases illustrating the distinction between false pretences and larceny, will be found under the latter head.

What shall amount to a false pretence.] "The term 'false pretences,' says Mr. East (2 *P. C.* 828), is of great latitude, and was used, as Ashurst, J., remarked, in *Young's case* (*supra*), to protect the weaker part of mankind, because all were not equally prudent; it seems difficult, therefore, to restrain the interpretation of it to such false pretences only, against which ordinary prudence cannot be supposed sufficient to guard. But still it may be a question, whether the statute extends to every false pretence, either absurd or irrational on the face of it, or such as the party has, at the very time, the means of detecting at hand; or whether the words, which are general, shall be considered co-extensively with the cheat actually

effected by the false pretences used. These may, perhaps, be matters proper for the consideration of the jury, with the advice of the court." In the following case, however, the judges appear to have been of opinion, that the want of common prudence and caution, on the part of the prosecutor, was an answer to the indictment: The prisoner was indicted for obtaining meat from the prosecutor, who was a butcher, under pretence that he would pay for the same on delivery, and would send the money back by the servant of the prosecutor. The jury found a verdict of guilty, and that, at the time the prisoner applied for the meat, and promised to send the money back, he did not intend to return the money, but by that means to obtain the meat and cheat the prosecutor. On a case reserved for the opinion of the judges, they held the conviction wrong, and that it was not a pretence within the meaning of the statute. It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it. *Goodhall's case, Russ. & Ry.* 461.

In *Woolley's case*, 1 *Den. C.C.R.* 559; *S. C.* 19 *L. J. M. C.* 165, Erle, J., observed, that "the notion that law was only for the protection of the strong and prudent, had ceased to prevail;" and Alderson, B., said, "If a man represents as an existing fact, that which is not an existing fact, and so gets your money, that is a false pretence; for instance, that a certain church had been built, and that there was a debt still due for the building, where there was no debt due, that would be a false pretence; yet the matter might be easily inquired into and ascertained." In that case the prisoner, who was the secretary of an Odd Fellows' lodge, told a member that he owed the lodge 13*s*. 9*d*., and thereby obtained from him that sum fraudulently, whereas the member only owed 2*s*. 2*d*.; it was held that he was rightly convicted.

The pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. Therefore, a pretence that a party would do an act, he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence within the act, but merely, as held above, a promise for future conduct. *Goodhall's case, supra.* So an indictment for obtaining money from H. G. H. under the false pretence that the prisoner intended to marry H. G. H., and wanted the money to pay for a wedding-suit he had purchased, is not sufficient to sustain a conviction. *Reg.* v. *Johnston*, 2 *Moo. C. C.* 254. See *R.* v. *Copeland, post*, p. 458.

It is no objection that the false pretences are of some fact relating to a future event. Thus where the four prisoners came to the prosecutor representing that they had betted that a person named Lewis should walk a certain distance within a certain time, and that they should probably win, and thus obtained money from the prosecutor toward the bet; it was objected that, although the representation of a thing past or present, against which caution cannot guard, may be within the statute (30 Geo. 3, c. 24), yet if it be the representation of some *future* transaction respecting which inquiries may be made, it is not an indictable offence, but the subject only of a civil remedy. The Court of King's Bench, however, were of opinion that false pretences, referring to future transactions, were equally within the statute. *Young's case*, 3 *T. R.* 98; see *Reg.* v. *Christey*, 1 *Cox, C. C.* 239.

Where a person, with intent to defraud, gives a cheque upon a banker with whom he keeps no account, this is a false pretence

within the statute. The prisoner, for the purpose of defrauding the prosecutor, gave him, in payment for goods, a cheque upon a banker with whom he kept no cash and had no account. He was indicted upon the statute 30 Geo. 2, c. 24, and *Lara's case* (*ante*, p. 366) was cited. *Per Bailey J.*, "This point has been recently before the judges, and they were all of opinion, that it is an indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid." *Jackson's case*, 3 *Campb.* 370; *Henry Jackson's case*, *York Sum. Ass.* 1830, *coram Bayley*, *J.*, *Matthews's Dig. C. L.* 167. So where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found, that before the completion of the sale and delivery of the watch by the prosecutor to the prisoner, he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, or that he could provide funds to pay it; the judges held, that he was properly convicted. *Parker's case*, 7 *C. & P.* 825; *S. C.* 2 *Moo. C. C.* 1. See 2 *Russ. by Grea.* 300 (*n*).

An indictment on the 7 & 8 Geo. 4, c. 29, s. 53, stated that the prisoner contriving, &c. to cheat A. B., falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note which he then delivered to A. B., was a valuable security for 21*l.*; by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.*, whereas the prisoner was not a captain, &c., and the note was not a valuable security, &c. It was held, as it did not appear but that the note was the prisoner's own note, or that he knew it to be worthless, there was no sufficient false pretence in that respect, and as the two pretences were to be taken together, that the indictment was bad, and the judgment given upon it was reversed in error. *Wicham* v. *The Queen*, 10 *A. & E.* 34.

Where the indictment alleged, that the defendant "did unlawfully and falsely pretend," &c., it was held, that the omission of the word "knowingly" was no ground for arresting the judgment. *R.* v. *Bowen*, 13 *Q. B.* 790; *S. C.* 19 *L. J. M. C.* 65. Lord Denman said, "The only difficulty I have felt has been occasioned by the decision of the judges in *R.* v. *Henderson*, 2 *Moo. C. C.* 192; but I think it was not sufficiently brought before the attention of the court, that the word 'knowingly' is not in the statute, 7 & 8 Geo. 4, c. 29." The knowledge, however, by the defendant, that the pretences were false must be proved to the satisfaction of the jury, in order to warrant them in finding a verdict of guilty. *Haycraft* v. *Creasy*, 2 *East*, 92.

Although there may have been a previous confidence between the parties, yet if the particular money or goods in question were obtained under false pretences, it is an indictable offence within the statute. The prisoner was indicted under the 30 Geo. 2, for obtaining money under false pretences. The prosecutors were clothiers, and the prisoner, a shearman in their service, and employed as superintendent to keep an account of the persons employed and the amount of their wages and earnings. At the end of each week he

was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such sums, as, according to a written account or note delivered to him by the prisoner, were necessary to pay them. The prisoner was not authorised to draw money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorised to pay any sums, except such as he carried in, in his note or account. The prisoner delivered to the prosecutor's clerk, a note in writing, in this form, "9 Sept. 1796, 44*l*. 11*s*. 0*d*.," which was the common form in which he made out the note. In a book in his handwriting, which it was his business to keep, were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum of 44*l*. 11*s*. 0*d*. The prisoner being found guilty, on a case reserved for the opinion of the judges, it was argued, that the statute did not extend to cases where there was a previous confidence. At first, there was some diversity of opinion; but finally, they all agreed, that if the false pretence created the credit, the case was within the statute. They considered that the defendant would not have obtained the credit, but for the false account he had delivered in; and, therefore, that he was properly convicted. The defendant, as was observed by one of the judges, was not to have any sum that he thought fit on account, but only so much as was worked out. *Witchell's case*, 2 *East*, *P. C.* 830.

It was the duty of the prisoner, who was the servant of the prosecutors, in the absence of their chief clerk to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion, he falsely stated to the chief clerk, that he had paid 2*s*. 3*d*. for kitchen stuff, which he had bought for his master, and demanded to be paid for it. The clerk on this paid 2*s*. 3*d*. out of money which his masters had furnished him with to pay for the kitchen stuff, and the prisoner applied the money to his own use. It was held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Barnes's case*, 2 *Den. C. C. R.* 57; *S. C.* 20 *L. J. M. C.* 34.

The indictment charged, that one Barrow, at K., &c., delivered to the prisoner, a common carrier, certain goods to be carried by him from K. to one Leach, at L., there to be delivered, &c.; that the defendant received the goods under pretence of carrying them, and delivering them, and undertook so to do, but that intending to cheat Barrow of his money, he afterwards unlawfully, &c. pretended to Barrow, that he had carried the goods from K. to L., for the purpose of delivering them to Leach, and had delivered them to Leach at L., and that Leach had given him, the defendant, a receipt, expressing the delivery of the goods to him, but that he had lost, or mislaid the same, or had left it at home, and that the defendant thereupon demanded of Barrow 16*s*. for the carriage of the said goods, by means of which false pretences he obtained the money, &c. On a writ of error after conviction, the judgment was affirmed. *Airey's case*, 2 *East*, *P. C.* 831; 2 *East*, *R.* 30. The defendant, Count Villeneuve, applied to Sir T. Broughton, telling him, that he was employed by the Duke de Lauzun, to take some horses from Ireland to London, and that he had been detained so long by contrary winds, that all his money was spent; by which representations Sir T. Broughton was

induced to advance some money to him; after which it turned out that the defendant never had been employed by the duke, and that the whole story was a fiction. The defendant was convicted. *Villeneuve's case, coram Moreton, C. J., at Chester*, cited by *Buller, J.*, in *Young's case*, 3 *T. R.* 101, 103.

Where an attorney who had appeared for J. S., who was fined 2*l.* on a summary conviction, called on the wife of J. S., and told her that he had been with J. N., who was fined 2*l.* for a like offence, to Mr. B. and Mr. L., and that he had prevailed upon them to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.*, he would go and do the same for her; and she thereupon gave him a sovereign, and afterwards paid him for his trouble; and it was proved that the attorney never applied to Mr. B. or Mr. L. respecting either of the fines, and both were afterwards paid in full; it was held, that the attorney was guilty of obtaining money by false pretences. *Asterley's case*, 7 *C. & P.* 191.

It is said by a writer of authority, that a man cannot be guilty of a forgery, merely by passing himself off as the person whose real signature appears, though for the purposes of fraud, and in concert with such real person; for there is no false making. But this appears to be a false pretence within the statute 30 Geo. 2, c. 24. 2 *East, P. C.* 856.

The mere breach of a warranty, or a false assertion at the time of a bargain, cannot, as it seems (but see *post*, p. 454), be construed into an obtaining money by false pretences. The indictment stated, that the defendant, by falsely pretending to one Varlow, that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grandfather, obtained the sum of 29*l.* 3*s.* 0*d.*, whereas he was not entitled to any interest in any share, &c. (negativing the pretences). To prove the pretences a deed, assigning the defendant's interest in one-seventh share of the interest to Varlow was put in, and in this deed was contained the usual covenant for title; Littledale, J., observed, that a covenant in a deed could not be taken to be a false pretence. The prosecutor stated, that the defendant asked him to purchase a seventh part of some money which he would be entitled to under his grandfather's will, on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and thereupon paid the defendant the purchase money. To prove the falsity of the pretences, a previous assignment by the defendant to a person named Peck was put in. After argument, Littledale, J., said, "The doctrine contended for, on the part of the prosecutor, would make every breach of warranty, or false assertion at the time of a bargain, a transportable offence. Here the party bought the property, and took as his security a covenant, that the vendor had a good title. If he now finds that the vendor had a good title, he must resort to the covenant. This is only a ground for a civil action." *Codrington's case*, 1 *C. & P.* 661. The indictment charged that the defendant, having in his possession a certain weight of 28 pounds, falsely pretended to C. that a quantity of coals which he delivered to C. weighed 16 hundred weight (meaning 1,792 pounds weight), and were worth 1*l.*, and that the weight was 56 pounds; by means of which he obtained a sovereign from C., with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coals did not weigh 1,792 pounds; and were not worth 1*l.*; and whereas the weight was not 56 pounds; and whereas the coals were of the weight of 896 pounds only, and were not worth more

than 10*s.*; and whereas the weight was 28 pounds only. The prisoner being convicted, it was moved in arrest of judgment, that all the pretences mentioned in the indictment, except that which related to the false weight, were no more than mere false affirmations; and that as to the weight, there was no allegation in the indictment to connect the sale of the coals with the use of the weight. The judges held the conviction on the indictment wrong. *Reed's case*, 7 *C. & P.* 848.

The prisoner had accepted a bill drawn on him by the prosecutor for 2,638*l.*, which he owed to the latter. The bill was negotiated, and when it became due, the prosecutor asked the prisoner if he was prepared to pay it. The prisoner answered that he was prepared with sufficient funds, all but 300*l.*, and that he expected to get the loan of that sum from a friend. The prosecutor expressed his willingness to advance the 300*l.* himself, and ultimately did so, but the prisoner, instead of taking up the bill, applied the 300*l.* to his own purposes, and suffered the bill to be dishonoured, and the prosecutor eventually had to pay it. Evidence was also given, that at the time the prisoner obtained the money, he was not in possession of funds sufficient to make up the balance between the 2,638*l.* and the 300*l.* but was in insolvent circumstances. For the prisoner it was contended, that the representation was not a false pretence within the statute, being a mere mis-statement, or at the worst a naked lie, and *Codrington's case*, *ante*, p. 453, was cited; and, secondly, that the act did not extend to cases where the prosecutor had only lent, not parted with the property of the goods or money. Patteson, J., said, "The words of this act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* from the prosecutor by a deliberate falsehood, averring that he had all the funds required to take up the bill, except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appears to me that the jury ought to convict the prisoner. In *R.* v. *Codrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. As to the money being advanced by the prosecutor only as a loan, the terms of the act of parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer." The prisoner was acquitted. *R.* v. *Crossley*, 2 *Moo. & R.* 17; 2 *Lew. C. C.* 164.

A false pretence, knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make; *Reg.* v. *Kenrick*, 5 *Q. B.* 49; where it was stated by Lord Denman, that *R.* v. *Codrington* had been much doubted by the judges. The decision in *R.* v. *Kendrick* was unanimously acted upon by the judges, in *Abbott's case*, 1 *Den. C. C. R.* 276. In that case, the prosecutor bought cheese of the prisoner at a fair, and paid for it. Before he bought it the prisoner, who was offering cheese for sale there, bored two of the cheeses with an iron scoop, and produced a piece of cheese, called a taster, at the end of the scoop, for the prosecutor to taste; this he did, believing it to have been taken from the cheese, and upon that belief bought the cheese; in fact, however, it was taken from another superior kind of cheese, and had been fraudulently inserted in the scoop by the prisoner. It was held, that upon these facts he was rightly convicted of obtaining the price of the cheese from the prose-

cutor by false pretences. So in a subsequent case where the prisoner by falsely representing to the prosecutor, that he had built a house on certain land, and by depositing with the prosecutor the lease of the land as a security, and by entering into a written agreement to execute a mortgage on the land, induced the prosecutor to advance him money by way of loan; he was held by all the judges, to have been properly convicted for obtaining the money by false pretences. *Burgon's case*, 25 *L. J. M. C.* 105. So also if a man asks a pawnbroker to advance money on a chain which he pretends to be silver, but which he knows to be of another metal of inferior value, he is liable to be indicted for attempting to obtain money by false pretences. *Roebuck's case*, 25 *L. J. M. C.* 101. See also *Eagleton's case*, 24 *L. J. M. C.* 158.

As to the assumption of a false name and profession, see *R.* v. *Hamilton*, 2 *Cox, C. C.* 244.

What shall amount to—not necessary that words should be used.] The statute, 33 Hen. 8, c. 1 (now repealed), related to false pretences by means of a false seal or token; and under the general words "false pretence," in the statute 30 Geo. 3, c. 24, it was held, that the offence might be effected by other means than by words. The prisoner was indicted for unlawfully producing to A. B., &c. at the Nottingham post-office, a money order for the payment of one pound to one John Storer, and that he unlawfully pretended to the said A. B. that he was the person named in such order, with intent, &c., whereas, &c. It appeared in evidence, that the prisoner had gone to the post-office, and inquired for letters for John *Story*, whereupon by mistake, a letter for John *Storer*, containing the money order, was delivered to him. He remained a sufficient time to read the letter, and then presented the order to A. B., who desired him to write his name upon it, which he did in his real name, John *Story*, and received the money. The terms of the letter clearly explained, that the order could not have been intended for the prisoner, who, on being apprehended, denied that he had ever received the money, but afterwards assigned the want of cash as the reason of his conduct. Chambre, J., left it to the jury to find against the prisoner, if they were satisfied that he had, by his conduct, fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of opinion, 1st, that the prisoner writing *his own name* on the order, did not amount to a forgery; and 2ndly, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by a false pretence within the statute. *Story's case*, *Russ. & Ry.* 81; see *Freeth's case*, *Id.* 127, *S. P. infra.* So where a person at Oxford, who was not a member of the university, went to a shop for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods; this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. *R.* v. *Barnard*, 7 *C. & P.* 784.

What shall amount to—goods obtained upon an instrument void in law.] Although the instrument by means of which the prisoner carries his intent to defraud into effect, may be on the face of it illegal, and of no value; yet if the prisoner fraudulently obtains the goods, &c., he may be convicted. The prisoner was indicted in one count, upon the statute 30 Geo. 2, c. 24, and in another, as for an offence at com-

mon law. It appeared in evidence, that the prisoner came to the prosecutor's shop, and asked for a loaf, which he served to him for five pence; that the prisoner then asked him for some tobacco, and the prosecutor served him with an ounce for three pence. The prisoner then threw down a note for ten shillings and sixpence, upon which the prosecutor said, he had no change, but in copper. The prisoner said copper would do. The prosecutor then gave him nine shillings and ten pence in copper, which the prisoner took with the loaf and tobacco, and went away. The note was forged. The same evening, and the following morning, the prisoner put off several similar forged notes. The notes purported to be made by Sparrow, who was a person of good credit, and whose notes under 20*s*. were generally circulated in the neighbourhood. It was contended for the prisoner, that this was not within the statute, which was confined to cases of false suggestions, but it appeared to the learned judge, that the uttering of the note as a genuine note was tantamount to a representation that it was so. It was also objected, that a note of this sort being void, and prohibited by law, it was no offence to forge such a note, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The learned judge, however, left the case to the jury, who found the prisoner guilty on both counts, and the case was reserved for the opinion of the judges. All being present (except Rooke, J.), the majority of them thought that the conviction was right, and that it was a false pretence, notwithstanding the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. Lawrence, J., was of a different opinion, and thought that the shopkeeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing, *if true*. *Freeth's case*, *Russ. & Ry.* 127. Fraudulently offering a "flash note" in payment, under the pretence that it is a Bank of England note, is a false pretence within the statute. *Coulson's case*, 1 *Den. C. C. R.* 592; *S. C.* 19 *L. J. M. C.* 182. A sailor's shipping note for 2*l*. 15*s*., payable to A. B. or bearer, five days after the ship shall sail, is not a void instrument under the 17 Geo. 3, c. 30, but is an "undertaking, warrant, or order for the payment of money" under the 11 Geo. 4 and 1 Wm. 4, c. 66, s. 3. Therefore, where such an instrument was forged, and goods obtained by means of it, it was held, that the prisoner ought to have been indicted for forgery; and that an indictment for obtaining goods by false pretences, could not be sustained. In this case, Parke, B., after consulting Coltman, J., said, "Where a party commits a forgery, and subsequently obtains goods by use of the forged instrument, the proper course is to indict for the felony." *Reg.* v. *Anderson*, 2 *Moo. & R.* 469.

On an indictment for obtaining money by falsely pretending that the promissory note of a bank which had stopped payment by reason of bankruptcy, was a good and valuable security for the payment of the amount mentioned in it, and was of that value, it is sufficient to prove the time when the bank stopped payment, and that cash could not be obtained for the note on its being presented for payment at the place where it was made payable, and it is not necessary to prove the proceedings in bankruptcy. *Smith's case*, 6 *Cox, C. C.* 314.

Proof of the false pretences.] The pretences must be proved as laid. Where in the averment of the pretence it was stated, "that the defendant pretended that *he had paid* a certain sum into the

bank of England," and the witness stated, that the words used were, "the money has been paid at the bank." Lord Ellenborough said, "In an indictment for obtaining money by false pretences, the pretences must be distinctly set out, and at the trial they must be proved as laid. An assertion that money has been paid into the bank is very different from an assertion, that it had been paid into the bank, by a particular individual. The defendant must be acquitted. *Plestow's case*, 1 *Campb.* 494. "There the assertion that an individual had paid the money was not proved." Per Maule, J., in *Hewgill's case*, 1 *Dears. C. C. R.* 322. But where the indictment charged, that the defendant having in his custody a *certain parcel* to be delivered, &c. for which he was to charge 6*s*., delivered a ticket for the sum of 9*s*. 10*d*. by means, &c., and it appeared in evidence that the parcel mentioned in the indictment was a *basket* of fish, it was objected that this was a variance, but Lord Ellenborough overruled the objection, saying, that a basket answered the general description of a parcel well enough, but that if the indictment had been on the 39 Geo. 3, c. 58 (which enacts, that if any porter, or other person employed in the porterage, or delivery of boxes, *baskets*, packages, *parcels*, trusses, game, or other things, shall take any greater sum, &c.) it would have been a fatal variance. *Douglas's case*, 1 *Campb.* 212. An indictment stated, that the prisoner did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from the Agricultural Assurance Company a large sum of money, to wit, 22*l*. 10*s*., with intent thereby to cheat and defraud the company; it was held, that the nature of the attempt was not sufficiently set forth. *Marsh's case*, 1 *Den. C. C. R.* 505; *S. C.* 19 *L. J. M. C.* 12.

The rule that the false pretences averred in the indictment must be proved as laid, is subject to the qualification that *all* the pretences need not be proved, but that a single false pretence, proved as laid, though joined with others, is sufficient to support the indictment. The defendant was indicted under the 30 Geo. 2, for obtaining money under pretence of assisting two seamen to procure a pension, and it was alleged that he pretended, that "two guineas must be sent up to the under clerks as fees, *which they always expected, and that nothing could be done without it.*" The part of the pretences printed in italics was not proved, and it was objected that this was a fatal variance, but the defendant being convicted, the judges held the conviction right. *Hill's case*, *Russ. & Ry.* 190.

It is sufficient if the actual substantial pretence, which was the main inducement to the prosecutor to part with his money, be alleged and proved; although it may be shown by evidence, that other matters, not laid in the indictment, operated in some measure upon the mind of the prosecutor as an inducement to him to part with his money. *Hewgill's case*, 1 *Dears. C. C. R.* 315. But the rule that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together upon the record that one cannot be separated from the other, and the statement of one of those pretences is insufficient in point of law, no judgment can be given on the other pretence. 2 *Russ. by Grea.* 310, citing *Reg.* v. *Wickham*, 10 *Ad. & E.* 34, *ante*, p. 451. Where it appears that statements were made on different occasions, it is a question for the jury whether they are so connected as to form one continuing representation. Thus the defendant with

the view of inducing the prosecutrix to become a member of a burial society, had represented to her that the society was strong and respectable, and had 7000*l.* in the bank. On this occasion she declined to join the society. A month afterwards he again made a similar statement, but said nothing about the 7000*l.* in the bank. She then consented to enter the club and pay the subscription. The statement with regard to the 7000*l.* being untrue; it was held to be a question for the jury, whether the two conversations were so connected as to form one continuing representation. *Welman's case*, 1 *Dears. C. C. R.; S. C.* 22 *L. J. M. C.* 118.

Parol evidence is admissible of the false pretences laid in the indictment, though a deed between the parties, stating different considerations for parting with the money, be also put in evidence for the prosecution, such deed having been made for the purpose of the fraud. *Reg.* v. *Adamson*, 2 *Moo. C. C.* 286. The prisoner was indicted for falsely pretending that his wife was dead, with intent to defraud a benefit society. The stewards required a certificate of her death, and the prisoner produced to them a false one. It was held, that the real false pretence was that of the wife's death, and not the feigned certificate of it, which latter was the only evidence of the actual false pretence. *Reg.* v. *Dent*, 1 *Cox, C. C.* 15; *S. C.* 1 *C. & K.* 249. Where the false pretences are contained in a letter, and such letter has been lost, the prisoner, after proof of the loss, may be convicted on parol evidence of its contents. *Chadwick's case*, 6 *C. & P.* 181.

It must appear that the prosecutor parted with his property, by reason of the false pretences, or one of the false pretences charged. The prisoner was indicted for obtaining a filly, by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that the prisoner bought the filly of the prosecutor, and made him this statement, which was false, and also told him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly, because he believed that the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c. It was held by Coleridge, J., that the prisoner must be acquitted. *Dale's case*, 7 *C. & P.* 351; see also *George Smith's case*, 2 *Russ. by Grea.* 312.

In *Kealey's case*, 2 *Den. C. C. R.* 69; *S. C.* 20 *L. J. M. C.* 57, the indictment charged the false pretence to have been made to "John Baggalley and others;" it was proved to have been made to John Baggalley; but this was held to be no variance for that the words "and others" might be rejected as surplusage.

The prisoner represented himself to be paymaster of the *Duke of Wellington*, and that his name was de Lancy, upon which he made with the prosecutrix a contract for board and lodging at a guinea a-week. He was lodged and fed as the result of that contract, and the engagement entered into upon this representation, which was found to be a false pretence. It was held, that a conviction upon the above facts was bad, "because the supply of articles upon the contract was too remotely the result of the false pretence to support an indictment for obtaining the articles by the false pretence." *Gardner's case*, 25 *L. J. M. C.* 100.

Proof of the falsity of the pretence.] The falsity of the pretence must clearly appear on the prosecutor's evidence, and must not be left to inference. The prisoner bought from the prosecutor at Rugeley

fair a horse for 12*l.* and tendered him in payment notes to that amount on the Oundle bank. On the prosecutor objecting to receive these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the horse. The prisoner was indicted for obtaining the horse on false pretences, *viz.* by delivering to the prosecutor certain papers purporting to be promissory notes, well knowing them to be of no value, &c. It appeared in evidence, that these notes had never been presented by the prosecutor at Oundle, or at Sir J. Esdaile's in London, where they were made payable. A witness stated, that he recollected Rickett's bank at Oundle stopping payment seven years before, but added that he knew nothing but what he saw in the papers, or heard from the people who had bills there. The notes appeared to have been exhibited under a commission of bankrupt against the Oundle bank. The words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them. The jury found the prisoner guilty, and said they were of opinion, that when the prisoner obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor. On a case reserved, the judges held the conviction wrong, and that the evidence was defective in not sufficiently proving that the notes were bad. No opinion was given, whether this would have been an indictable fraud, if the evidence had been sufficient. *Flint's case, Russ. & Ry.* 460. The defendants were indicted for obtaining money under the false pretence of their being collectors of the property tax. It appeared in evidence, that they had in fact been appointed collectors by the commissioners, but that their appointment was informal. This was held not to be a false pretence within the statute, 30 Geo. 2, c. 24; *Dobson's case*, 7 *East*, 218. The defendant was indicted for obtaining money by falsely pretending that a note purporting to be the promissory note of Coleman, Smith, and Morris, was a good and available note of C. S. and M., whereas it was not a good and available note. The defendant gave the note to the prosecutor in payment for meat. A witness proved that he had told the defendant that the Leominster bank (from which the note issued) had stopped payment. It was also proved that the bank was shut up, and that Coleman and Morris had become bankrupts; but it appeared that Smith, the third partner, had not become bankrupt. Gaselee, J., said, that upon this evidence, the prisoner must be acquitted, because, as it appeared, that the note might ultimately be paid, it could not be said that the defendant was guilty of a fraud in passing it away. *Spencer's case*, 3 *C. & P.* 420; *Clark's case*, 2 *Dick. Q. S., by Talfourd*, 315.

The prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she afterwards refused to ratify. He then threatened her with an action, and by this means obtained money from her. During the whole of the transactions the prisoner had a wife. On an indictment against him for obtaining money under false pretences, the pretences laid were, first, that he was unmarried; secondly, that he was entitled to bring and maintain his action against her for a breach of promise of marriage. It was held that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence that the prisoner was a single man, and in a condition to marry; and that this was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of

promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute. *Reg.* v. *Copeland, Carr. & M.* 516. See also the same case as to the form of the indictment.

Proof of intent to cheat or defraud.] It must appear that the defendant obtained the money, &c., with intent to cheat or defraud some person of the same. Thus, where in an indictment for obtaining money under false pretences, the allegation of the obtaining the money did not state that it was with intent, &c., the judges, on the point being reserved for their consideration, were of opinion that the indictment was bad. *Rushworth's case, Russ & Ry.* 317; 1 *Stark.* 396.

The primary intent must be to cheat and defraud. Thus, where the prisoner was indicted for having procured from the overseer of a parish, from which he received parochial relief, a pair of shoes, by falsely pretending that he could not go to work because he had no shoes, when he had really a sufficient pair of shoes; and it appeared in evidence, that on the overseer bidding him go to work, he said he could not, because he had no shoes, upon which the overseer supplied him with a pair of shoes, whereas the prisoner had a pair before; the prisoner being convicted, the case was considered by the judges, who held that it was not within the act (30 Geo. 3, c. 24,) the statement made by the prisoner being rather a false excuse for not working, than a false pretence to obtain goods. *Wakeling's case, Russ. & Ry.* 504. A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s wife, and got two sacks of malt from her, saying that B. had bought them of A., which he knew to be false, and took the malt to his master, in order to enable him to pay himself; it was held by Coleridge, J., that if C. did not intend to defraud A., but only to put it in his master's power to compel A. to pay him a just debt, he could not be convicted of obtaining the malt by false pretences. *Williams's case*, 7 *C. & P.* 354. A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C., at the Oxford Infirmary, and thereby obtained one sovereign, with intent to defraud G. P., "of the same." The second count laid the intent to be to defraud G. P. "of the sum of 5*s*., parcel of the value of the said last mentioned piece of current gold coin." It was proved that the defendant made the pretence, and thereby induced the prosecutor to buy, at the price of 5*s*., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign, and received 15*s*. in change. It was further proved that the defendant was not Mr. H. It was held that this was a false pretence within the act, and that the intent was properly laid in the second count. *Reg.* v. *Bloomfield, Carr. & M.* 537.

But see the note to *Leonard's case*, 1 *Den. C. C. R.* 306, where it is suggested that the second count in *Reg.* v. *Bloomfield* was bad as averring an obtaining of one thing with intent to cheat of another. In *Leonard's case* the first count of the indictment charged the prisoner with obtaining from the prosecutor an order for the payment of 14*l*. 1*s*. 2*d*. by false pretences with intent to defraud him of the same: the evidence as to this count was that the prisoner only intended to defraud the prosecutor of 7*s*., as the rest of the money was really due, it was held that the first count was proved. The second count was similar to the second count in *Bloomfield's case*,

and upon this the court recommended the recorder who had reserved the case, to pass a separate sentence upon it.

Now by sect. 8 of the 14 & 15 Vict. c. 100, it is sufficient to allege in the indictment, "that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person."

Sect. 18 of the same statute enacts, that "in every indictment in which it shall be necessary to make any averment as to any money or any note of the bank of England or any other bank, it shall be sufficient to describe such money or bank note, simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."

Proof of the obtaining some chattel, money, or valuable security.] In order to render it an offence within the statute, the property obtained must come within the description of "*chattel, money, or valuable security.*" An unstamped order for the payment of money, which ought to be stamped under 55 Geo. 3, c. 184, is not a valuable security within the statute. *Yates's case*, 1 *Moody, C. C.* 170.

A railway pass-ticket, enabling a person to travel free on the journey, is a "chattel" within the statute. "The ticket," said Pollock, C. B., in delivering the judgment of the court, "while in the hands of the party using it was an article of value entitling him to travel without further payment; and the fact that it was to be returned at the end of the journey does not affect the question." *Boulton's case*, 1 *Den. C. C. R.* 508; *S. C.* 19 *L. J. M. C.* 67.

Obtaining credit with a banker by false pretences, and thus procuring him to pay drafts to third persons, is not an obtaining money, chattel, or valuable security within the 7 & 8 Geo. 4, c. 29. The defendant was indicted for obtaining money under false pretences. The first count stated the false pretences by which the defendant procured the prosecutors to cash a cheque in favour of one Jacob, and concluded thus, "and obtained from them the amount of the cheque to be paid to the said Jacob, and further advances to him to answer other cheques drawn by him on the prosecutors, *viz.* &c., with intent, &c." In the second count it was alleged, that the defendant by means, &c., obtained a large sum of money, to wit, &c., from the prosecutors, and also the cheque mentioned to be paid to the said Jacob, with intent, &c. It appeared in evidence, that in order to induce the prosecutors, who were the defendant's bankers, to give him credit, and honour his cheques, he delivered to them a bill drawn by him upon a person with whom he had no account, and which had no chance of being paid. The prosecutors paid the amount of the cheque to Jacob. The defendant was convicted, and on a case reserved for the opinion of the judges, they were of opinion that the prisoner could not be said to have obtained any specific sum on the

bill; all that was obtained was credit on account, and they therefore held the conviction wrong. *Wavell's case*, 1 *Moody*, *C. C.* 224. The defendant had procured a circular letter of credit from D. S. and Co., of New York, for 210*l.*, of which they advised their correspondents the Union bank of London. The defendant came to England and drew various sums from the Union bank, but to less amount than the 210*l.*, and then going to St. Petersburg, altered the letter of credit by inserting the figure "5," so as to make it appear to be a letter of credit for 5210*l.* By this means he obtained from W. and Co., of St. Petersburg, large sums of money, giving drafts for those amounts upon the Union bank, which drafts referred to the letters of credit, and one of these was presented by W. and Co's. branch house in London to the Union bank, but was not paid. The defendant having returned to England, was indicted for attempting to obtain money from the Union bank by false pretences, and was convicted, the jury finding that he meant the draft to be presented and the money to be obtained thereon: it was held, however, by the Court of Criminal Appeal, after two arguments, that if the money had actually been obtained, it would not have been an offence within the statute, and therefore that the conviction was bad. *Garrett's case*, 1 *Dears. C. C. R.* 232; *S. C.* 23 *L. J. M. C.* 20. Campbell, C. J., in giving judgment, said, "I think the act means that the money should be obtained according to the wish, or to gain some object of the party who makes the false pretence. Here the obtaining of it was not to obtain any object of the prisoner. No advantage could arise to him from the cheque being honoured. He had gained his full object when he was in St. Petersburg. It was a matter of perfect indifference to him whether Wilson and Co. did or did not obtain payment from the Union bank. It would have been much more for his benefit had the cheque been lost at sea on its passage from St. Petersburg to London."

Obtaining money by way of loan, by means of false pretences, is within the statute. See *Crossley's case*, *ante*, p. 454.

The money obtained may be by way of gift and yet still be within the statute; as in the case of a begging letter making false representations as to the condition and character of the writer by means of which money is obtained. *Jones's case*, 1 *Den. C. C. R.* 551; *S. C.* 19 *L. J. M. C.* 162.

It is sufficient for the prosecutor to prove that some part of the goods, &c., stated in the indictment (for the rule in this respect is the same as in larceny, see that title), were obtained from him by the false pretences used.

Proof of the ownership of the property.] The property obtained by means of the false pretences, must be proved to be the property of the party mentioned in the indictment. The prisoner was indicted for obtaining the sum of 3*s.* 4*d.* of the monies of the Countess of Ilchester. It appeared in evidence, that the prisoner brought a basket of fish, which he delivered to the servant of the countess, with a false ticket, charging 3*s.* 4*d.* too much for carriage. The servant paid him the full amount, and was repaid by Lady Ilchester. On it being objected, that at the time of payment this was not her money, Lord Ellenborough said, that her subsequent allowance did not make the money paid to the defendant her money at the time. She was not chargeable for more than was actually due for the carriage, and it depended upon her whether she should pay the overplus. The ser-

vant, however, afterwards swore that, at the time of this transaction, he had in his hands upwards of 9*s.* 10*d.* (the whole sum charged) the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. *Douglas's case*, 1 *Campb.* 212.

The indictment must state whose property the money, &c. is which has been obtained; since otherwise a conviction or acquittal on such indictment, could not be pleaded in bar to a subsequent indictment for larceny, in respect of the same transaction. *Norton's case*, 8 *C. & P.* 197. And this defect is not aided by verdict; *Martin's case*, 8 *Ad. & E.* 481; 3 *C. & P.* 472; nor cured by the 14 & 15 Vict. c. 100, ss. 8, 25. *Sill* v. *Reg.* (*in error*), 1 *Dears. C. C. R.* 132; *S. C.* 22 *L. J. M. C.* 41. And see *Bullock's case*, 25 *L. J. M. C.* 92.

Proof of all being principals.] Where several persons were indicted for obtaining money under false pretences, it was objected, that although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another, but that each was answerable for himself only, the pretence conveyed by words being, like the crime of perjury, a separate act in the person using them; the Court of King's Bench, however, held, that as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly. *Young's case*, 3 *T. R.* 98.

On an indictment for obtaining money under false pretences, a party who has concurred and assisted in the fraud, may be convicted as principal, though not present at the time of making the pretence and obtaining the money. *Reg.* v. *Moland & others*, 2 *Moo. C. C.* 276.

Defendant not to be acquitted where the offence appears to be larceny.] By the 7 & 8 Geo. 4, c. 29, s. 53 (*vide ante*, p. 448), if it appears on the trial, that the defendant obtained the property in question in any such manner as to amount in law to larceny, he shall not be entitled to be acquitted by reason thereof. In all cases, therefore, where it is doubtful whether, in point of law, the offence is larceny or a misdemeanor, the safest course is to indict the party as for a misdemeanor; for should it appear upon an indictment for larceny, that the offence is, in fact, that of obtaining money, &c., under false pretences, the prisoner must be acquitted.

The Irish statute, the 9 Geo. 4, c. 55, also recites in s. 46, that a failure of justice frequently arises from this subtile distinction between larceny and fraud; but the provision in this clause, which was intended to obviate the defect in the law, was rendered nugatory and ineffectual by the omission of the word *not;* the error is now amended by the 5 & 6 Wm. 4, c. 34.

Cheating at play punishable as a false pretence.] By the 8 and 9 Vict. c. 109 (E. & I.), s. 17, "every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by false pretence,

with intent to cheat or defraud such person of the same, and being convicted thereof, shall be punished accordingly."

The offence under this section is *winning*, and it is not necessary therefore to state in the indictment the name of the person whose money is alleged to have been won. *Moss's case*, 5 *Weekly Rep.* 54, (Mich. Term, 1856), see *ante*, p. 463.

Obtaining bounty money by false representation punishable as a false pretence.] The 18 & 19 Vict. c. 11, s. 57, provides that "any recruit who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this act annexed, before the justices at the time of his attestation, and shall obtain any enlisting money or bounty for entering into her Majesty's service, shall be deemed guilty of obtaining money under false pretences, within the true intent and meaning of the 7 & 8 Geo. 4, c. 29." For a decision upon this section, see *Jessup's case*, 25 *L. J. M. C.* 54.

Restitution of the property obtained.] The court had not the power, formerly, of ordering the restitution of property obtained by false pretences, the statute, 21 Hen. 8, c. 11, extending only to stolen property. But now by the 7 & 8 Geo. 4, c. 29, s. 57, the court has power in cases of misdemeanor to award the restitution of the property. See this section stated, *post*, *title*, *Larceny*.

FISH.

TAKING OR DESTROYING FISH.

It will be seen (*post, title, Larceny*), that larceny might be committed at common law of fish in a tank or net, or as it seems in any inclosed place, where the owner might take them at his will. 2 *East, P. C.* 610. But it was no larceny to take fish in a river, or other great water, where they were at their natural liberty. *Hawk. P. C. b.* 1, *c.* 33, *s.* 39. Property of this kind was protected by various statutes (4 & 5 Wm. 3, c. 23, s. 5; 22 & 23 Car. 2, c. 25, s. 7; 9 Geo. 1, c. 22; 5 Geo. 3, c. 14); but those statutes are now repealed by the 7 & 8 Geo. 4. c. 27, and the substance of them is re-enacted in the 7 & 8 Geo. 4, c. 29. By s. 34, "if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be in any the land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing herein-before contained shall extend to any person angling in the day-time; but if any person shall by angling in the day-time unlawfully and wilfully take or destroy, or attempt to take or destroy any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any such sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is herein-before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto."

On an indictment under the above section, the taking of the fish need not be such a taking as would be necessary to constitute larceny. See *Glover's case, R. & R.* 269.

The words "adjoining," &c., "to the dwelling-house," import actual contact, and, therefore, ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *Hodges' case, M. & M.* 341.

And by s. 35, "if any person shall at any time be found fishing,

against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be so found, his servants, or any person authorised by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time, against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

And by s. 36, "if any person shall steal any oysters or oyster brood from any oyster bed, laying, or fishery being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall with any net, instrument, or engine drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months, and it shall be sufficient in any indictment or information to describe either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any parcular parish, township, or vill: provided always, that nothing therein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only."

The Irish statute, the 5 & 6 Vict. c. 106, has consolidated and amended the several acts relating to the fisheries of Ireland: in its 71st sect. it enacts a summary penalty against persons entering upon lands or premises for the purpose of fishing without authority: and its 11th sect. is a provision respecting oysters, closely similar to the above 36th sect. of the 7 & 8 Geo. 4, c. 29.

As to destroying the dams of fish ponds, &c., see *title*, *Malicious Injuries*.

FORCIBLE ENTRY AND DETAINER.

Offence at common law.] It seems that entering with such force and violence into lands or tenements, as to exceed a bare trespass, was an offence indictable at common law. *Wilson's* case, 8 *T. R.* 357; 1 *Russ. by Grea.* 304. But against this offence provision has been made by various statutes.

Offence by statute.] The first enactment against forcible entries is that of 5 Rich. 2, c. 8, which merely forbids them.

By the 15 Rich. 2, c. 2, it is accorded and assented, that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs, or assemblies in disturbance of the peace or of the common law, or in affray of the people, shall be holden and kept, and fully executed, joined to the same that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of the peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king.

This statute was followed by that of 8 Hen. 6, c. 9, which, after reciting the 15 Rich. 2, c. 2, enacts, for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained if the sheriff do not obey the commandments and precepts of the said justices, for to execute the said ordinances, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments, and discontinuances, sometimes made to lords, and other puissant persons, and extortioners, within the said counties where they be conversant, to have maintenance, and sometimes to

such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the king's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf; enacts, that from henceforth, where any doth make any forcible entry on lands and tenements, or other possessions, or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statutes duly to be executed, and that at the costs of the party so grieved. (*See Wilson's case, post*, p. 470.)

By section 10 of this statute, the justices are directed to re-seize the lands or tenements entered upon, and to put the party put out into full possession of the same. But it is provided, that they who keep their possession with force, in any lands and tenements whereof they or their ancestors, or they whose estate they have continued their possession in the same, for three years or more, be not endamaged by the statute. This proviso is enforced by the 31 Eliz. c. 11, s. 3, which declares that no restitution shall be made, if the person indicted has had the occupation or been in quiet possession for the space of three whole years together, next before the day of the indictment found, and his estate therein not ended or determined.

In order to extend the remedy for forcible entries upon other estates than those of freehold, it was, by 21 Jac. 1, c. 15, enacted, "that such judges, justices, or justices of the peace as, by reason of any act or acts of parliament now in force, are authorised and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible withholding before them duly found), to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's service, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

Upon a prosecution under these statutes, the prosecutor must prove,—1, the entry or detainer; 2, that it was forcible; 3, the possession upon which the entry was made; and 4, that it was made by the defendant.

Proof of the entry.] A forcible entry or detainer is committed by violently taking or keeping possession of lands or tenements by menaces, force, and arms, and without the authority of law. 4 *Bl. Com.* 148. It must be accompanied with some circumstances of actual violence or terror, and therefore an entry which has no other force than such as is implied by law in every trespass, is not within the statutes. *Hawk. P. C. b.* 1, *c.* 64, *s.* 25. The entry may be violent, not only in respect to violence actually done to the person of a man, as by beating him if he refuses to relinquish possession; but also in respect to any other kind of violence in the entry, as by breaking open the doors of a house, whether any person be within or not, especially if it be a dwelling-house; and perhaps by acts of outrage after the entry, as by carrying away the party's goods. *Ibid. s.* 26; see 3 *Burr.* 1702 (*n*).

But if a person who pretends a title to lands, barely goes over them, either with or without a great number of attendants armed or unarmed, in his way to the church or market, or for such like purposes, without doing any act which expressly or impliedly amounts to a claim to such lands, this is not an entry within the meaning of the statutes. *Hawk. P. C. b.* 1, *c.* 64, *s.* 20. Drawing a latch and entering a house is said not to be a forcible entry, according to the better opinion. *Id. s.* 26; *Bac. Abr. Forcible Entry* (B.), 1 *Russ. by Grea.* 710.

Proof of the force and violence.] Where the party, either by his behaviour of speech, at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions which plainly imply a purpose of using force against those who make resistance. *Hawk. P. C. b.* 1, *c.* 64, *s.* 27. But it seems that no entry is to be judged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any similar damage, which is not personal. *Id. s.* 28; *sed vide supra.*

It is not necessary that there should be any one assaulted to constitute a forcible entry; for, if persons take or keep possession of either house or land, with such numbers of persons and show of force as are calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer. *Per Abbott, C. J., Milner* v. *Maclean*, 2 *C. & P.* 18. An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such kind of force as is calculated to prevent any resistance. *Per Lord Tenterden, C. J., Eliza Smyth's case*, 5 *C. & P.* 201.

Proof that the detainer was forcible.] The same circumstances of violence or terror which make an entry forcible will make a detainer forcible also; therefore, whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he return, shall be adjudged guilty of a forcible detainer, though no attempt is made to re-enter; so also, it is said, if he place men at a distance from the house, to assault any one who shall attempt to make an entry; but barely refusing to go out of a house, and continuing therein in despite of another, is not a forcible detainer. *Hawk. P. C. b.* 1, *c.* 64, *s.* 30. So where a lessee, at the end of his term, keeps arms in his house to prevent the entry of the lessor, or a lessee at will retains possession with force, after the determination of the will; these are forcible detainers. *Com. Dig. Forc. Det.* (*B.* 1).

The statute, 15 Ric. 2, only gave a remedy in cases of forcible detainer where there had been a previous forcible entry; but the statute, 8 Hen. 6, c. 9, gives a remedy for forcible detainer after a previous *unlawful* entry; for the entry may be unlawful, though not forcible. *Oakley's case*, 4 *B. & Ad.* 307. But it does not hence follow that the statute 8 Hen. 6, does not apply to the case of a tenant

at will, or for years, holding over after the will is determined, or the term expired; because the continuance in possession afterwards may amount, in judgment of law, to a new entry. *Per Parke, J., id.* p. 312, citing *Hawk. P. C. b.* 1, *c.* 64, *s.* 34.

A conviction for a forcible detainer is bad, if it only state that the prosecutor complained to the justices of an entry and unlawful expulsion and forcible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices cannot know by their view without evidence, that the detainer was unlawful, or that there had been an unlawful entry. Semble, that the conviction ought to show that the defendant was summoned, or had otherwise an opportunity to defend himself. Held also, that the court was bound to award a re-restitution, as a consequence of quashing the conviction without inquiring into the legal or equitable claims of the respective parties. *Wilson's case*, 3 *A. & E.* 817; *Attwood* v. *Joliffe*, 3 *N. Sess. Cas.* 116.

Proof of the possession upon which the entry was made.] With regard to the kind of entry in respect of which a person may be guilty of a forcible entry, it is said by Hawkins to be a general rule, that a person may be indicted for a forcible entry into such incorporeal hereditaments, for which a writ of entry will lie either at common law, as for rent, or by statute, as for tithes; but that there is no good authority that such an indictment will lie for a common or an office. So no violence offered in respect of a way or other easement, will make a forcible entry. *Hawk. P. C. b.* 1, *c.* 64, *s.* 31. Nor can a person be convicted under the 15 Ric. 2, of a detainer of any tenements into which he could not have made a forcible entry. *Ibid.*

It is said by Hawkins, that it seems clear that no one can come within the intention of the statutes, by any force whatsoever done by him on entering into a tenement whereof he himself had the sole and lawful possession, both at and before the time of such entry, as by breaking open the door of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into the land of his own tenant at will. The learned writer has added a "*sed quære*" to this passage, and Lord Kenyon has observed that perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. *Wilson's case*, 8 *T. R.* 361.

There seems now to be no doubt that a party may be guilty of a forcible entry, by violently and with force entering into that to which he has a legal title. *Newton* v. *Harland*, 1 *M. & G.* 644; 1 *Russ by Grea.* 305, and (*n*).

The possession of a joint tenant, or tenant in common, is such a possession as may be the subject of a forcible entry or detainer by his co-tenant; for though the entry of the latter be lawful *per mie et per tout*, so that he cannot in any case be punished for it in an action of trespass, yet the lawfulness of the entry is no excuse for the violence. *Hawk. P. C. b.* 1, *c.* 64, *s.* 33.

Upon an indictment founded on the 8 Hen. 6, it must be shown that the entry was upon a freehold; and if founded on the 21 Jac. 1, that it was upon a leasehold, &c., according to that statute. *Wannop's case, Sayer*, 142. On a prosecution for a forcible entry on the possession of a lessee for years, it is sufficient to prove that such lessee was *possessed*, although the indictment allege that the premises were

his *freehold. Lloyd's case, Cald.* 415. Proof that the party holds colourably, as a freeholder or leaseholder, will suffice; for the court will not, on the trial, enter into the validity of an adverse claim, which the party ought to assert by action, and not by force. *Per Vaughan, B., Williams's case, Talf. Dick. Sess.* 239.

Proof that the offence was committed by the defendant.] This offence may be committed by one person as well as by several. *Hawk. P. C. b.* 1, *c.* 64, *s.* 29. All who accompany a man when he makes a forcible entry, will be adjudged to enter with him, whether they actually come upon the land or not. *Id. s.* 22. So also will those who, having an estate in land by a defensible title, continue by force in possession, after a claim made by one who has a right of entry. *Id. s.* 23. But where several come in company with one who has a right to enter, and one of the company makes a forcible entry, that is not a forcible entry in the others. 3 *Bac. Abr. Forcible Entry* (*B.*). And a person who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he no way concurred in, or promoted the force. *Hawk. P. C. b.* 1, *c.* 64, *s.* 24.

An infant or feme covert may be guilty of a forcible entry, for actual violence done by such party in person; but not for violence done by others at their command, for such command is void. A feme covert, it is said, may be imprisoned for such offence, though not an infant, because he shall not be subject to corporal punishment, by force of the general words of any statute in which she is not expressly named. *Hawk. P. C. b.* 1, *c.* 64, *s.* 35. A feme covert may be guilty of a forcible entry, by entering with violence into her husband's house. *Eliza Smyth's case*, 5 *C. & P.* 201.

Award of restitution.] The court in which the indictment is found, or the Court of King's Bench upon the removal thither of the indictment by *certiorari*, has power on the conviction of the defendant to award restitution to the party upon whose possession the entry has been made. *Hawk. P. C. b.* 1, *c.* 64, *ss.* 49, 50, 51. Though by the provisoes in the statutes of Hen. 6 and James 1, the defendants may set up a possession for three years to stay the award of restitution. *Id. s.* 53. A supersedeas of the award of restitution may be granted by the same court that made the award. *Id. s.* 61. And a re-restitution may be awarded by the King's Bench. *Id. s.* 66. See *Wilson's case, ante*, p. 470.

Before conviction it is in the discretion of the judge of assize to award a restitution or not, although a true bill has been found by the grand jury for a forcible entry. *Harland's case*, 2 *Lew. C. C.* 170; 8 *Ad. & E.* 826; 1 *P. & D.* 93; 2 *M. & R.* 141.

FORESTALLING.

The offence of forestalling, with which may likewise be considered those of engrossing and regrating, was defined to be every practice or device, by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise. 3 *Inst.* 196; 3 *Bac. Abr.* 261; 1 *Russ. by Grea.* 168. All endeavours whatever to enhance the common price of any merchandise, and all kinds of practice which had an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, were offences at common law, and came under the general notion of forestalling, which includes all kinds of offences of this nature. *Hawk. P. C. b.* 1, *c.* 80, *s.* 1. These offences were prohibited by several old statutes; but those acts were repealed by the 12 Geo. 3, c. 71, leaving the offences as they stood at common law, and punishable by fine or imprisonment, or both.

In modern times prosecutions have seldom been instituted for any of these offences; but in one case, an information for enhancing the price of hops was sustained. *R.* v. *Waddington*, 1 *East*, 143.

Now, by the 7 and 8 Vict. c. 24, s. 1, it is enacted, "that after the passing of this act the several offences of badgering, engrossing, FORESTALLING, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution shall lie either at common law, or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences."

FORGERY.

Under the present head will first be stated, the law of forgery, as it regards all forged instruments, with the general proofs necessary to establish the act of forging, uttering, &c. The evidence required to prove the forgery of particular documents, both private and public, will then be given.

Forgery at common law.] At common law the offence of forgery was punishable as a misdemeanor. It is defined by Sir W. Blackstone as "the fraudulent making or alteration of a writing to the prejudice of another man's right;" 4 *Com.* 247; and by Mr. East, as "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 *East, P. C.* 852.

With regard to the nature of the instruments or writings, the forging of which is punishable at common law, it has been held that the falsification of records and other matters of a public nature is a misdemeanor, as a privy seal; 1 *Roll. Ab.* 68; a license from the barons of exchequer to compound debts; *Id.* 65; *Gregory* v. *Wilks*, 2 *Bulst.* 137; a parish register; *Hawk. P. C. b.* 1, *c.* 70; or a certificate of holy orders, or a matter of record. *Hawk. P. C. b.* 1, *c.* 70, *s.* 9, 10. So a forged letter, in the name of a magistrate, to the governor of a gaol, directing the discharge of a prisoner, has been held to be a forgery. *Harris's case*, 6 *C. & P.* 129; 1 *Moody, C. C.* 393, *S. C.* And see *Fawcett's case*, 2 *East, P. C.* 862, *infra.*

So with regard to private writings, it is an offence at common law to forge a deed or will. *Hawk. P. C. b.* 1, *c.* 70, *s.* 10. And though doubts were formerly entertained on the subject, it is now clear that forging any private document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule. Thus, after much debate, it was held that forging an order for the delivery of goods was a misdemeanor at common law. *Ward's case, Str.* 747; 2 *Ld. Raym.* 1461. And the same was held by a majority of the judges, with regard to a document purporting to be a discharge from a creditor to a gaoler, directing him to discharge a prisoner in his custody. *Fawcett's case*, 2 *East, P. C.* 862. *Ward's case* is con-

sidered by Mr. East to have settled the rule, that the counterfeiting of *any writing*, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 *East, P. C.* 861. The forging of a railway pass, to allow the bearer to pass free on a railway, is a forgery at common law; but the uttering of it is not a misdemeanor unless some fraud was actually perpetrated by it. *Per* Cresswell, J., in *Boult's case*, 2 *C. & K.* 604. To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, is an offence at common law. *Toshack's case*, 1 *Den. C. C. R.* 492. Or a false testimonial to character. *Sharman's case*, 1 *Dears. C. C. R.* 285.

It is not necessary to the sustaining an indictment for forgery at common law, that any prejudice should in fact have happened by reason of the fraud. *Ward's case, Str.* 747; 2 *Ld. Raym.* 1461. Nor is it necessary that there should be any publication of the forged instrument. 2 *East, P. C.* 855, 951; 1 *Russ. by Grea.* 318.

It is not forgery fraudulently to procure a party's signature to a document, the contents of which have been altered without his knowledge; *R.* v. *Chadwicke*, 2 *Moo. & R.* 545; or fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. *Per Rolfe, B., R.* v. *Collins; MS.*, 2 *Moo. & R.* 461.

Proof of the false making—in the name of the party—assuming the name of a person in existence.] The most usual kind of forgery is, where the party assumes the name and character of a person actually in existence, and by means of the credit attached thereto, carries his fraud into effect; as in the following case: The prisoner, whose name was Hadfield, appeared in the neighbourhood of the lakes of Cumberland, calling himself the Hon. Alexander Augustus Hope, brother of the Earl of Hopetown, and in that name imposed upon several persons in the neighbourhood. During his residence near the lakes, he drew a bill upon a gentleman in the neighbourhood, which would have been paid, had not the prisoner been detected. For this forgery, he was indicted, convicted, and executed. *Hatfield's case*, 6 *Ev. Stat.* 580; 2 *Russ. by Grea.* 331.

The adoption of a false *description* and *addition*, where a false name is not assumed, and there is no person answering the description, has been held not to be forgery. *Webb's case, Russ. & Ry.* 405; *aliter*, if there be an existing person answering the description. *Blenkinsop's case*, 1 *Den. C. C. R.* 276; *S. C.* 17 *L. J. M. C.* 62. In this case an address was put to the name of the drawer of a bill of exchange, while the bill was in the course of completion, with the intention of making the acceptance appear to be that of a different existing person: and it was held to be forgery.

Of the false making—in the name of the party—party forging having the same name.] A man may be guilty of forgery by the fraudulent making of an instrument, though in his own name; as if he makes a feoffment of lands to J. S., and afterwards a deed of feoffment of the same lands to J. D., of a date prior to that of the feoffment to J. S. *Hawk. P. C. b.* 1, *c.* 70, *s.* 2. And the offence, it is said, would have been the same, if he had passed only an equitable interest for a good consideration, and had afterwards by such a subsequently antedated conveyance endeavoured to avoid it. *Id.* So if a bill of exchange, payable to A. B. or order, come to the hands of a person named A. B. (not the payee) who fraudulently

indorses it for the purpose of obtaining the money, this is a forgery. *Mead* v. *Young*, 4 *T. R.* 28; see also *Parke's case*, 1 *Cox*, *C. C.* 4. The prisoner, whose name was Thomas Brown, was charged together with Matthias Parkes, with forging a promissory note, purporting to be made by Thomas Brown. It appeared that the prisoner Brown had passed the note in question to a tradesman, representing it to him as the note of his brother. The note was dated at Roughton, Salop, and was made payable at Thornton and Co.'s, bankers, London. It was proved that there was no person of that name and description residing at Roughton, and that no such person kept an account at Thornton and Co.'s. It was objected for the prisoner Brown, that the note being made in his own name, could not be a forgery; but the judges on a case reserved, held that he had been properly convicted. Grose, J., in delivering their opinion, said, "The prisoner, at the time he uttered the note, did not utter it as his own note, but as the note of his brother, of the same name; but there is no brother of the prisoner of the name of *Thomas Brown* existing, and, therefore, this is the false making of a note in the name of a non-existing person, for it is equally a forgery, whether the non-existing person be described as bearing the name of the person uttering the note, or another name. The prisoner, therefore, although his name is Thomas Brown, having uttered the note, describing the signature as the name of another person, is as guilty of having uttered a forged note, as if he had uttered a note on which any other name whatever had been forged." *Parkes' and Brown's case*, 2 *Leach*, 775; 2 *East*, *P. C.* 963. The authority of this case has been doubted by Mr. Evans, who has observed, that it appears to rest on very questionable principles, and in opposition to it, he cites the following case: A bill of exchange was made by the prisoner, D. Walker (a pauper at Manchester). It was dated Liverpool, signed D. Walker and Co., and drawn on Devayne's and Co., London. Similar bills had been before drawn in the same manner, and regularly paid, though the drawer was unknown to that house. *Parkes' and Brown's case*, *supra*, was cited; but the learned judge ruled, that there was not evidence sufficient to go to the jury. *Walker's case*, *coram Chambre, J.*, *Lanc.*, 6 *Evans's Stat.* 580. In support of his opinion, Mr. Evans refers to *Hevey's case*, 1 *Leach*, 229 (*vide post*, p. 495), where a prisoner, who had assumed to be the real indorser of the bill, was held not to be guilty of forgery, there being no false making; but upon this, it may be observed, that the fact of there being no false making in the latter case, seems to distinguish it entirely from *Brown's case*, and to prevent its being considered an authority against that decision. An eminent writer has made the following comments upon *Brown's case*. "In the abstract it amounts to this, that a man who signs his own name to a note, dated at a place where he does not reside, and payable at a banker's where he has no money, is guilty of forgery. It is remarkable that the jury did not expressly find an intention on the part of the prisoner, at the time of the making, to utter it as the note of a third person. If the note contained a mere promise to pay (without place of date or payment), signed by the prisoner, and was afterwards uttered by him as the note of another, the case would be more doubtful. See also *R.* v. *Webb*, 3 *B. & B.* 228;" 2 *Stark. Ev.* 333 (*n.*), 2*nd ed.* A point similar to that upon which *Brown's case* turned, occurred in the following case, but was not decided. The prisoner, George Maddocks, was charged with forging the following indorsement upon a bill:—

"*Per pro for Rob. Falcon, George Maddocks.*"

It appeared that he was clerk to an attorney, and had authority to open letters, receive money, and to do what was necessary in case a writ was wanted; but he had no authority to indorse a bill. The bill in question was sent in a letter to the prosecutor's chambers, where the letter was opened by the prisoner, who after writing upon the bill the indorsement mentioned above, took it to the bank, and received payment. He gave a receipt, "Received for R. F. (his master's real name), G. M." On the following day he wrote to his master, stating he had taken the bill for *acceptance*, though at that time he had received the money. He then absconded. On his trial he said he received the money for his master's use, and did not intend to apply it otherwise. The judge left it to the jury to say, whether the prisoner meant only to receive the money for his master's use, and acted under a supposition, in the situation of trust in which he was placed, that he had a right to describe himself as acting by procuration, or whether he made the indorsement and received the money, for the purpose of defrauding the prosecutor or the bank. The jury were of opinion that it was for the purpose of fraud, and referred to the letter in which the prisoner spoke of having taken the bill for *acceptance;* and found him guilty. As it did not appear that the prisoner had offered to make use of the indorsement to transfer the bill to any other person, or to enable himself to receive the contents as bearer or holder, having on the contrary given the receipt in his own name for the use of his master, a doubt arose, whether the indorsement was such an "indorsement" as was meant by the statute. The question, whether, under the special circumstances of his conduct, the prisoner ought to have been acquitted, or whether a false assertion in an indorsement that the prisoner has a procuration, without any other circumstance of falsehood or misrepresentation, constitutes a forgery, was referred to the judges, but no opinion was given, the prisoner dying in prison. *Maddock's case,* 2 *Russ. by Grea.* 499.

Many of the above cases were cited in the argument in *White's case,* 1 *Den. C. C. R.* 208. The prisoner Emanuel White, was indicted for forging a certain indorsement on a certain bill of exchange for 18*l.* 12*s.*, with intent to defraud Thomas Tomlinson." The bill in question purported to be drawn by M. C. on W. N., to be accepted by W. N., and then to be indorsed by M. C., and "per procuration, Thomas Tomlinson, Emanuel White." This latter was in the prisoner's handwriting; and he subsequently got the bill discounted and absconded with the money. The prosecutor swore that he never authorised the prisoner to indorse bills for him, or to accept bills, or to sign his name, or to use his name, and if he ever did send him to get the money on any bill of exchange it was ready indorsed. The judges held that this was no forgery.

Proof of the false making—in the name of the party—fictitious name.] Making an instrument in a fictitious name, or the name of a non-existing person, is equally forgery, as making it in the name of an existing person. 2 *East, P. C.* 957; 2 *Russ. by Grea.* 331. The prisoner was indicted under the 2 Geo. 2, c. 25, for uttering a forged deed, purporting to be a power of attorney from Elizabeth Tingle, administratrix of Richard Tingle, late a marine, empowering a person to receive prize money due to her. There was no such person as Elizabeth Tingle. The prisoner being convicted, a doubt was enter-

tained, whether, as there was no such person in existence as the party in whose name the deed was executed, it amounted to forgery, and the case was referred to the judges, when eleven of them were of opinion, that the case was within the meaning and the letter of the act. *Lewis's case*, *Foster*, 116. In a case which occurred a few years after the preceding, where a prisoner had been convicted of indorsing a bill of exchange in a fictitious name, the judges, on a reference to them, held unanimously, that a bill of exchange, drawn in fictitious names, where there were no such persons existing as the bill imported, was a forged bill within the 2 Geo. 2. *Wilks's case*, 2 *East*, *P. C.* 957. The same point was decided by the judges in *Bolland's case*, 1 *Leach*, 83; 2 *East*, *P. C.* 958. And again where the prisoner had forged a cheque upon a banker in the name of a fictitious person, the judges observed, that it would be a very forced construction of the statute to say, that the forgery of a fictitious name, with intent to defraud, was not within it. *Lockett's case*, 1 *Leach*, 94; 2 *East*, *P. C.* 940. So if a person write an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person. *Per Bosanquet, J.*, *Rogers's case*, 8 *C. & P.* 629.

It is not necessary, in order to render the act forgery, that the party should gain any additional credit by the fictitious name.

The prisoner was indicted for forging an indorsement of a bill of exchange in the name of *John Williams*. It appeared that the prisoner having paid away the bill, the holder applied to a banker to discount it, which he refused to do, unless the holder would put his name upon it. This the holder declined to do, but said, he would procure the person from whom he received it, to indorse it. He accordingly applied to the prisoner, who immediately indorsed it, "John Williams," which was a fictitious name, and the bill was discounted. On a case reserved, the judges were unanimously of opinion, that this was forgery within the statute; for although the fictitious name was not necessary for the prisoner's obtaining the money, and his object in it, probably, was only to conceal the hands through which the bill had passed, yet it was a fraud both upon the holder and discounter, as the one lost the chance of tracing the bill, and the other the benefit of a real indorser. *Taft's case*, 1 *Leach*, 172; 2 *East*, *P. C.* 959. So where the prisoner, having got possession of a bill indorsed in blank, gave a receipt for the amount in a fictitious name, being indicted for this forgery, it was objected, that he gained no additional credit by the name he assumed. Being convicted, the case was reserved for the opinion of the judges, who (with the exception of Buller, J., who doubted) unanimously held that the conviction was right. They said, that though the prisoner did not gain any additional credit by signing the name he put to the receipt, as the bill was not payable to the person whose name was used, but indorsed in blank, it was still a forgery, for it was done with intent to defraud the true owner of the bill, and to prevent the possibility of tracing the person by whom the money was received. *Taylor's case*, 2 *East*, *P. C.* 960; 1 *Leach*, 214.

In order to prove that the name "Samuel Knight, market-place, Birmingham," was fictitious, the prosecutor was called and stated, that he went twice to Birmingham to make inquiries, and inquired at a bank there, and at a place where the overseers usually met; and that he also had made inquiries at Nottingham, without success.

The prosecutor was a stranger in both of these towns. It was objected for the prisoner, that this evidence was not sufficient; that in the case of a prosecution at the instance of King's College, in order to prove a certain name fictitious, the twopenny postman and police officer of the district were called. The judges at the Old Bailey (Parke and Parke, JJ. and Bolland, B.) were of opinion, that there was evidence, though not satisfactory, to go to the jury, not being the usual evidence given on such occasions, but that it was for the jury to say whether it was sufficient. The jury found the prisoner not guilty. *King's case*, 5 *C. & P.* 123. Upon an indictment for uttering a forged cheque upon Jones Lloyd and Co., bankers, purporting to be drawn by G. Andrews, it was held sufficient *primâ facie* evidence of the drawer's name being fictitious, to call a clerk of the bankers, who stated, that no person of that name kept an account with, or had any right to draw cheques on their house. *Backler's case*, 5 *C. & P.* 119; *Brannan's case*, 6 *C. & P.* 326. On an indictment for uttering a forged cheque it is sufficient to disprove the handwriting of the supposed maker; and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough. *Hurley's case*, 2 *Moo. & R.* 473.

Proof of the false making—in the name of the party—fictitious name—assumed and borne by the party forging.] The circumstance that the party making the forged instrument has assumed, and been known by the fictitious name in which it is executed, for some time before the making, will not prevent its being a forgery; there being no distinction whether the credit was given to the *person* of the prisoner, or the name assumed by him. On a prosecution for forging an order for the payment of money, it appeared that the prisoner had made the order in a fictitious name, and the prosecutor stated, that he looked upon it to be the prisoner's draft. The prisoner being convicted, a doubt arose upon the point, whether the prosecutor had given credit to the prisoner, or to the draft; but the judges held the conviction right, observing, that it was a false instrument, and not drawn by any such person as it purported to be. *Sheppard's case*, 2 *East, P. C.* 967; 1 *Leach*, 226.

The prisoner, Elizabeth Dunn, was indicted for forging a promissory note as the maker. The note was subscribed,

her
Mary ⋈ Wallace,
mark.

It was payable to the prosecutor, a prize agent, to whom the prisoner applied in the character of executrix of John Wallace, a deceased seaman. The prosecutor having advanced her the sum mentioned in the note, wrote the body of it, and desired her to sign it, asking her what name he must write over her mark. She replied, *Mary Wallace*, and the prosecutor's clerk put his name as a witness. The prisoner being found guilty, a case was reserved, when nine of the judges held the conviction right. Mr. Justice Ashton doubted, upon a principle not now maintainable, that to constitute forgery the instrument itself must be false, and that the merely assuming a fictitious name to it, will not make it forgery. *Dunn's case*, 1 *Leach*, 57; 2 *East, P. C.* 962.

The circumstances in the following case were somewhat different, and the judges were divided in opinion; though it is observed by

Mr. East (2 *P. C.* 968), that it is difficult to distinguish it from the foregoing case: The prisoner, *John Henry Aickles*, was indicted for forging a promissory note, which purported to be made by John Mason. The note, which was dated 18th of December, 1786, was offered in payment by the payee, Byron, on the 9th of January, 1787. Byron being asked where the maker lived, replied at No. 4, Argyle-street. On a reference there, it appeared that the prisoner had taken the house in the name of John Mason, and was known by that name. His name was in fact Aickles, by which he had been known up to 1780. Grose, J., told the jury, that if they believed that the name taken by the prisoner was in consequence of a concerted scheme between him and Byron, to defraud the prosecutor, they would be justified in finding him guilty; and he directed them to find whether the prisoner had ever gone by the name of John Mason before, and whether he had assumed it for the purpose of this fraud. The jury found that the prisoner intended to defraud the prosecutor, and that he assumed the name of Mason for the purpose of the fraud; that he had never gone by that name before, and that they disbelieved a witness who stated, that two years before he was inquired for, and known by that name at the British Coffee-house. The prisoner was found guilty by consent, subject to the opinion of the judges. Grose, J., and other judges, thought the case amounted to forgery. There was an apparent design to defraud in general, and the jury had found that the fictitious name was assumed with a design to defraud. Whether there was a person of that name was immaterial, the felony consisting in the intent to defraud. A person might assume a feigned name and make a draft in it, and yet innocently, as if he concealed himself to avoid arrest and had appointed his friend, on whom he drew, to pay his bill, or giving notes, took care to pay them when due. But the prisoner, on the contrary, intended to defraud the party by the feigned name, by making the note under a disguise by which, after he left the place of concealment, he could not be traced. There was nothing to distinguish this from the common case of a note made in the name of a man who does not exist. The judges who thought it not a forgery, proceeded on the doubt whether, to constitute a forgery it was not necessary that the instrument should be made as the act of another, according to the definition of Lord Coke, whether that other existed or not; whereas here the note was made as the prisoner's own, and avowed by him to be so; the credit was given to the person, and not to the name, and the person, and not the name, was the material thing to be considered. Upon some favourable circumstances appearing in the case of the prisoner, he was acquitted, and the judges never came to any final resolution upon the case. *Aickles's case*, 2 *East, P. C.* 968; 1 *Leach*, 438. The opinion of the judges who held the conviction of the prisoner right, has been defended by several writers of great eminence. 2 *East, P. C.* 972; 6 *Evans, Coll. Stat.* 580; 2 *Russ. by Grea.* 337. The point again arose, and was decided in the following case: The prisoner was indicted for forging a bill of exchange, dated 3rd of April, 1812, in the name of Thomas White, as drawer. It appeared that the prisoner came to Newnham, on the 21st March, 1813, where he introduced himself under the name of White, and where he resided under that name until the 22nd of May, officiating as curate under that name. On the 17th of April, he passed away the bill in question. Dallas, J., told the jury, that if they thought the prisoner went to Newnham in the fictitious character of a clergyman, with a false name, for the sole purpose of getting possession of the curacy,

and of the profits belonging to it, they should acquit him; but if they were satisfied that he went there, intending fraudulently to raise money by bills in a false name, and that the bill in question was made in prosecution of such intent, they should convict him. The jury convicted him accordingly, and found that the prisoner had formed the scheme of raising money by false bills, before he went to Newnham, and that he went there, meaning to commit such fraud. The judges, on a case reserved, were of opinion, that where proof is given of a prisoner's real name, and no proof of any change of name until the time of the fraud committed, it throws it upon the prisoner to show that he had before assumed the name on other occasions, and for different purposes. They were also of opinion, that where the prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, drawing, accepting, or indorsing in such assumed name is forgery. *Peacock's case*, 1 *Russ. & Ry.* 278.

The prisoner, Samuel Whiley,* was indicted for forging a bill of exchange, drawn in the name of *Samuel Milward.* On the 27th of December 1804, the prisoner came to the shop of the prosecutor, at Bath, and ordered some goods, for which, a few days afterwards, he said he would give a draft upon his banker in London, and accordingly he gave the bill in question. No such person as Samuel Milward kept an account with the London banker. The prisoner had been baptised and married by the name of *Whiley*, had gone by that name in Bath in the July preceding this transaction, and at Bristol the following October, and at Bath again on the 4th of December. About the 20th of that month he had taken a house in Worcestershire, under the same name; but, on the 28th of December, the day after his first application to the prosecutor, he ordered a brass plate to be engraved with the name of "Milward," which was fixed upon the door of his house on the following day. The prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; and if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods. In his defence, the prisoner stated that he had been christened by the name of *Samuel Milward*, and that he had omitted the name of *Whiley* for fear of arrest. The judge left it to the jury to say, whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the drafts with intent to defraud the prosecutor. The jury found the prisoner guilty, and the judges, upon a reference to them, were of opinion, that the question of fraud being so left to the jury, and found by them, the conviction was right. *Whiley's case*, 2 *Russ.* 335; *Russ. & Ry.* 90.

The prisoner, John Francis, was indicted for forging an order for payment of money upon the bankers, Messrs. Praed and Co., in favour of Mrs. Ward. On the 15th of August, the prisoner had taken lodgings at Mrs. W.'s house, under the name of Cooke, and continued there till the 9th of September, when he gave her the order in question, for money lent him by her. The order, which was signed "James Cooke," being refused by the bankers, he said he had omitted the word "junior," which he added; but the draft was again refused, and the prisoner in the mean time left the house. The case was left by the judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of Cooke with a fraudulent purpose, and they found him guilty. On a case reserved, all the judges who were present, held the conviction right, and were of

opinion that, if the name were assumed for the purpose of fraud and avoiding detection, it was as much a forgery as if the name were that of any other person, though the case would be different if the party had habitually used, and become known by, another name than his own. *Francis's case, Russ. & Ry.* 209; 2 *Russ. by Grea.* 339, 340.

To bring the case within the rule laid down in the above decision, it must appear that the name was assumed for the purposes of fraud in the particular transaction. The prisoner, Thomas Bontien, was charged with forging the acceptance of a bill of exchange. It appeared from the evidence of the prosecutrix, that having a house at Tottenham to let, in October 1811, the prisoner took it, and, to pay for the furniture and fixtures, wrote the bill in question, which the prosecutrix signed as drawer, and the prisoner accepted in the name of Thomas Scott. The bill was dated 12th of November 1810; the prisoner went at the time by the name of Thomas Scott: at various times he had gone by the name of Bontien; but he called a witness, who stated that he first knew the prisoner at the latter end of August 1810, and knew him continually by the name of Scott; that he had a nick name of *Bont* or *Bontien* at times. He proved that he had transacted buisness with the prisoner in the name of Scott, in the year 1810; that he never knew him by any other name; and that his only knowledge of his having gone by other names was from the newspapers. The prisoner being convicted, a majority of the judges, upon a case reserved (Mr. Justice Heath appearing of a contrary opinion), thought that it did not sufficiently appear upon the evidence, that the prisoner had not gone by the name of Scott before the time of accepting the bill, or that he had assumed the name for that purpose, and they thought the conviction wrong. *Bontien's case, Russ. & Ry.* 260.

Proof of the false making—with regard to the apparent validity of the matter forged.] It is said to be in no way material whether a forged instrument be made in such a way as, were it true, it would be of validity or not. *Hawk. P. C. b.* 1, *c.* 70, *s.* 7. But this, it is observed by Mr. East, must be understood where the false instrument carries on the face of it the semblance of that which is counterfeited, and is not illegal in its very frame; 2 *East, P. C.* 948. Thus in *Crooke's case*, who was indicted upon the statute 5 Eliz. c. 14, where the conveyance described the estate intended to be affected by a wrong name, and was therefore ineffectual at law, if genuine, to pass the property intended (though some of the judges thought that equity would have decreed a proper conveyance); yet the forgery was held indictable, it not being necessary that there should be a charge, or possibility of charge, if done with intent to defraud. *Crooke's case*, 2 *Str.* 901; 2 *East, P. C.* 948. So where a man was indicted at common law for forging a surrender of the lands of J. S., and it did not appear in the indictment that J. S. had any lands; upon motion in arrest of judgment, it was held good, it not being necessary to show any actual prejudice. *Goate's case*, 1 *Ld. Raym.* 737. Upon the same principle it has been held in several cases, that the false making of a will is forgery, although the supposed testator be alive. Where the prisoner had been convicted of forging the will of J. G., a living person, on a case reserved, it was objected for the prisoner, that the instrument, being ambulatory, could not properly be described as the last will and testament of J. G., and that there could not be a forgery of a thing which did not, and could not exist, at the time of the

forgery. But the judges held the conviction proper: they said that it was sufficient if it purported on the face of it to be a will, and that the objection was only applicable to the effect which a will has in law, and not to the fact of making it; that the instrument existed in his lifetime, though not to take effect till his death, and if the act of making it were not a forgery at the time, the subsequent publication of it would not make it so. *Coogan's case*, 2 *East, P. C.* 948; 1 *Leach*, 449. So the making of a false instrument is forgery, though it may be directed by statute that such instruments shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes. This question arose upon a prosecution for forging a power of attorney for the receipt of prize-money, which, by the 26 Geo. 3, c. 63, was required to have certain forms. The power had not, in one particular, followed the directions of the act. The prisoner being convicted, a case was reserved for the opinion of the judges, when all (except Graham, B., and Bayley, J.,) were of opinion that the letter of attorney was not a void instrument, but that it might be the subject of a criminal prosecution; that a payment made under it, to the use of the petty officer, would be good as against him, and that the attorney under it might bring an action for the prize-money, or execute a release. Graham, B., and Bayley, J., thought that it was a void instrument; that no person, without a breach of duty, could make the payment of prize-money under it; and consequently that no person could be guilty of a capital crime by forging it. *Lyon's case*, *Russ. & Ry.* 255. Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law. The prisoner was indicted for forging a bill of exchange. It was objected for him, that the bill was unstamped, and the 23 Geo. 3, c. 58, s. 11, was referred to, which enacts, that no bill of exchange shall be pleaded, or given in evidence in *any* court, or admitted in *any* court to be good or available at law or in equity, unless stamped. The prisoner was convicted, and the judges determined that the conviction was right; for the words of the act cited mean only, that the bill shall not be made use of to recover the debt; and besides, the holder of a bill was authorised to get it stamped after it was made. *Hawkeswood's case*, 1 *Leach*, 257. Soon after this decision, the point arose again, and on the authority of *Hawkeswood's case*, the prisoner was convicted, and executed. *Lee's case*, *Id.* 258 (*n*). The question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the mean time, the law, with regard to the procuring of bills and notes to be subsequently stamped, upon which, in *Hawkeswood's case*, the judges appear in some degree to have relied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted, the case was argued before the judges, and for the prisoner it was urged, that the stat. 31 Geo. 3, c. 25, s. 19, which prohibits the stamp from being afterwards affixed, distinguished the case from *Hawkeswood's*. Though two or three of the judges doubted at first the propriety of the latter case, if the matter were *res integra*, yet they all agreed, that being an authority in point, they must be governed by it; and they held, that the stat. 31 Geo. 3, made no difference in the question. Most of them maintained the principle of *Hawkeswood's case* to be well founded, for the acts of parliament referred to were mere revenue laws, meant to make no alteration in the crime

of forgery, but only to provide that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose; that it was not necessary, to constitute forgery, that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. *Morton's case*, 2 *East*, *P. C.* 955; 1 *Leach*, 258 (*n*). The doctrine was again confirmed in *Teague's case*, 2 *East*, *P. C.* 979, when the judges said, that it had been decided that the stamp acts had no relation to the question of forgery; but that, supposing the instrument forged to be such, on the face of it, as would be valid provided it had a proper stamp, the offence was complete.

Proof of the false making—with regard to the apparent validity of the matter forged—substantial resemblance to true instrument.] It is not essential that the forged instrument should, in all respects, bear an exact resemblance to the real instrument which it purports to be; it is sufficient if it bear a substantial resemblance. Where the forgery, says Mr. East, consists in counterfeiting any other known instrument, it is necessary that the resemblance should be an exact one: if it be so like as to be calculated to deceive, when ordinary and usual observation is given, it seems sufficient. The same rule holds, in cases of counterfeiting the seals, and coining. 2 *East*, *P. C.* 858. Thus where the prisoner was indicted for forging a bank-note, and a person from the bank stated that he should not have been imposed upon by the counterfeit, the difference between it and the true note being to him so apparent; yet, it appearing that others had been deceived, though the counterfeiting was ill executed, Le Blanc, J., held, that this was a forgery. *Hoost's case*, 2 *East*, *P. C.* 950. The prisoner was indicted for forging a bank of England note. The instrument, though it much resembled a real bank-note, was not made upon paper bearing the water-mark of the bank; the number also was not filled up, and the word "pounds" was omitted after the word "fifty;" but in the margin were the figures 50*l*. It was contended, that on account of these defects, this could not be held a forgery of a bank-note; but the judges held the prisoner rightly convicted; for, first, in forgery, there need not be an exact resemblance—it is sufficient that the instrument is *primâ facie* fitted to pass for a true one; secondly, the majority inclined to think that the omission of "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner: but it was matter to be left to the jury, whether the note purported to be for 50*l*., or any other sum; but all agreed that the 50*l*. in the margin removed all doubt. *Elliott's case*, 2 *East*, *P. C.* 951; 1 *Leach*, 175, 2 *New Rep.* 93 (*n*). See also *R.* v. *M'Connell*, 1 *C. & K.* 371; 2 *Moo. C. C.* 298.

The same point has arisen in several cases upon indictments for forging bills of exchange. The prisoner was indicted for forging, and also for uttering, a forged bill of exchange. He discounted the bill and indorsed the name upon it; but there was no indorsement of the name of the drawers, to whose order it was payable. It was urged for the prisoner, that as there was no indorsement by the payees, nor anything purporting to be such an indorsement, the instrument could not pass

as a bill of exchange, and could not, therefore, effect a fraud. The prisoner was convicted, and all the judges who were present on the argument of a case reserved, held the conviction proper. Lawrence, J., at first doubted, but his doubts were removed by the argument that, had it been the true and genuine bill it purported to be, the holder, for a valuable consideration from the payees, might have compelled the latter to indorse it. Mr. Justice Bayley was not present at the meeting, but thought the conviction wrong; he was of opinion that, for want of an indorsement, the bill was not negotiable, and therefore, if genuine, not of value to the holder of it. *R.* v. *Wicks, Russ. & Ry.* 149.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance," is a bill of exchange. *Per Patteson, J., R.* v. *Kinnear*, 2 *Moo. & R.* 117.

A mistake in the christian name of the party, in making the false signature to the instrument, will not prevent its being a forgery. The prisoner was indicted for forging the will of *Peter* Perry. The will began, "I, Peter Perry," and was signed,

his
John ⋈ Perry,
mark.

It was objected, that this was not a forgery of the will of Peter Perry, as laid in the indictment; but the prisoner was convicted, and afterwards executed. *Fitzgerald's case*, 2 *East, P. C.* 953.

So upon an indictment for vending counterfeit stamps (contrary to 44 Geo. 3, c. 98), it appeared that the stamp in all respects resembled a genuine stamp, excepting only the centre part which specifies the duty, which in the forged stamp had been cut out, and the words "Jones, Bristol," on a paper, pasted in the place. The fabrication was likely to deceive the eye of a common observer. The judges, on a case reserved, held, that the prisoner was rightly convicted of forgery, observing, that an exact resemblance, or *fac-simile*, was not necessary to constitute the crime of forgery; for, if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. *Collicott's case*, 2 *Leach*, 1048; 4 *Taunt.* 300; *Russ. & Ry.* 212.

Proof of the false making—with regard to the apparent validity of the matter forged—substantial resemblance to the true instruments—cases of non-resemblance.] Though a similarity to a common intent be sufficient, yet it is necessary that the forged instrument should in all essential parts bear upon the face of it the similitude of a true one, so that it be not radically defective and illegal in the very frame of it. 2 *East, P. C.* 952. This principle is illustrated by many cases which have occurred upon indictments for forging bills of exchange and promissory notes. The prisoner was indicted for uttering a forged promissory note. It appeared, that he had altered a note of the Bedford Bank, from one to forty pounds, but had cut off the signature of the party who had signed it, so that the words "for Barnard, Barnard, and Green," only were left. The prisoner being convicted, the judges were clearly of opinion that the conviction was wrong. *Pateman's case, Russ. & Ry.* 455.

The prisoner was indicted for having in his custody a certain

forged paper writing, purporting to be a bank-note, in the following form:—

"I promise to pay J. W., Esq., or bearer, £10.
London, March 4, 1776.
For Self and Company of
£Ten. *my* Bank of England.
Entered. John Jones."

A special verdict was found, and the question argued before the court was, whether this paper writing purported to be a bank-note. The court were of opinion, that the representation which the prisoner had made that it was a good note, could not alter the purport of it, which is what appears on the face of the instrument itself; for although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of felony. *Jones's case*, 1 *Leach*, 204; 2 *East*, *P. C.* 883; see 4 *Taunt.* 303.

The prisoner was indicted for putting off a forged promissory note. The instrument was as follows:—

No. 6414. Blackburn Bank. 30 Shillings.
I promise to take this as thirty shillings, on demand, in part for a two pound note, value received.
Entered. J. C. Blackburn, Sept. 18, 1821.
No. 6414.
Thirty Shillings. For Cunliffe, Brooks, and Co.
R. Cunliffe.

The prisoner was convicted; but it being doubted by the judge whether the instrument had any validity, a case was reserved, and the judges held, that the judgment ought to be arrested. It has been observed of this instrument, that it was not payable to the bearer on demand; that it was not payable in money; that the maker only promised to *take it* in payment; and that the requisitions of the statute, 17 Geo. 3, c. 30, were not complied with. *Burke's case*, *Russ. & Ry.* 496. So where the prisoner was indicted for forging the acceptance of a bill of exchange for 3*l.* 3*s.*, and it appeared that the requisitions of the statutes, 15 Geo. 3, c. 5, and 17 Geo. 3, c. 30, had not been complied with, the bill not specifying the place of abode of the payee, nor being attested by any subscribing witness, the prisoner having been convicted, the judges, on a reference to them, were unanimously of opinion, that the instrument, if real, would not have been valid or negotiable, and that therefore the conviction was wrong. *Moffatt's case*, 1 *Leach*, 431; 2 *East*, *P. C.* 954. This case was distinguished, on the conference of the judges, from *Hawkeswood's case*, *ante*, p. 483, where the holder of the bill had a right to get it stamped (see *Morton's case*, *ante*, p. 484); and the stamp act only says, it shall not be used in evidence till stamped. 2 *East*, *P. C.* 954.

A document in the ordinary form of a bill of exchange, but requiring the drawer to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, cannot, in an indictment for forging and uttering, be treated as a bill of exchange. *Per Erskine*, *J.*, *R.* v. *Bartlett*, 2 *Moo. & R.* 362. The prisoner was indicted for forging an order for the payment of money upon the treasurer of the navy. There was no payee named in the order; and upon this ground, and also upon the ground that the order was directed to the

treasurer and not to the *commissioners of the navy* (the latter being the legal paymasters), it was objected that the prisoner was wrongly convicted. Eleven of the judges having met, agreed that the direction to the treasurer instead of the commissioners, would not prevent its being considered an order for the payment of money; but the majority of them (Mansfield, C. J., *diss.*) held that it was not an order for the payment of money, because of the want of a payee, and that the conviction was wrong. *Richard's case, Russ. & Ry.* 193. In a case which occurred soon after the preceding, the judges ruled the same way, with regard to a bill of exchange, in which the name of the payee was left blank. *Randall's case, Russ. & Ry.* 195. But it has been holden, on a case reserved, that an instrument in the form of a bill of exchange with an acceptance on it is a bill of exchange, although there be no person named as drawer in the bill. *R.* v. *Hawkes*, 2 *Moo. C. C.* 60.

Upon the ground, that the instrument, if genuine, would have been of no validity, the following case was decided: The prisoner was convicted of forging a will of land, of one T. S. deceased, attested by *two* witnesses only. It did not appear in evidence what estate the supposed testator had in the land demised, or of what nature it was; and it was urged that it must be presumed to have been freehold, and that the will therefore was void by the statute of frauds, for want of attestation by three witnesses. The judges, on a conference, held the conviction wrong; for, as it was not shown to be a chattel interest, it was to be presumed to be freehold. *Wall's case*, 2 *East, P. C.* 953.

Proof of the act of forgery.] It is seldom that direct evidence can be given of the act of forgery. In the case of negotiable securities, the evidence is usually applied to the uttering rather than to the forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in a case of a bond or will, after proof that it has been forged by some one, a strong presumption necessarily arises against the party in whose favour the forgery is made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the forged instrument is in the handwriting of the prisoner, must, if unexplained, be necessarily strong evidence of his guilt. 2 *Stark. Ev.* 331, 2*d ed.*

In the description of the act of forging, it will not in general be a material variance if words are added which are not in the statute. Thus an indictment on the statute 2 Geo. 2, c. 25, which charged the defendant with feloniously altering, and causing to be altered, a certain bill of exchange, by falsely making, forging, and adding a cipher 0 to the letter and figure 8*l.*, &c. was held good, though the words of the statute were, "if any person shall make, forge, or counterfeit," and the word *alter* was not used. *Elsworth's case*, 2 *East, P. C.* 986, 988. So where an indictment, since the passing of the statute 11 Geo. 4 & 1 Wm. 4, c. 66, which uses only the word *forge*, stated that the prisoner "forged and *counterfeited*" a certain instrument, it was held not to be bad, and that the word "counterfeited" might be rejected. *Brewer's case*, 6 *C. & P.* 363.

Proof of the uttering.] It is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law. Where, therefore, the prisoner was indicted for uttering a forged testimonial to his character as a schoolmaster, and the jury found

him guilty of uttering the forged document with intent to obtain the emoluments of the place of schoolmaster, and to deceive, it was held that the prisoner was properly convicted. *Sharman's case*, 1 *Dears. C. C. R.* 285, *S. C.* 23 *L. J. M. C.* 51.

The various statutes relating to the offence of uttering forged instruments, employ various words to designate the act. In the 1 Wm. 4, c. 66, the terms used to describe the offence, are "offer, utter, dispose of, or put off." The averment of uttering will in general be proved by the same description of evidence as is necessary to maintain an indictment for uttering counterfeit coin, the cases respecting which have been already detailed, *ante*, p. 487.

Proof of uttering a forged *acceptance* will not support an indictment charging the prisoner with uttering a forged *bill*. *Horwell's case*, 6 *C. & P.* 148.

The addition of words not used by the statute 1 Wm. 4, c. 66, in describing the offence of uttering, as where the indictment stated that the prisoner uttered and "published as true," &c., will not vitiate the indictment. *Brewer's case*, 6 *C. & P.* 363, *ante*, p. 487.

Where the prisoner presented a bill for payment, with a forged indorsement upon it of a receipt by the payee, and on the person to whom it was presented objecting to a variance between the spelling of the payee's name in the bill and in the indorsement, altered the indorsement into a receipt *by himself* for the drawer, it was ruled that the presenting of the bill before the objection was a sufficient uttering of the forged indorsement. *Arscott's case*, 6 *C. & P.* 408.

Where upon an indictment for uttering a forged acceptance to a bill of exchange, it appeared that the bill in question came in a letter inclosed in the prisoner's handwriting, and that the day before the bill became due, the prisoner wrote a letter acknowledging it was a forgery, it was held not to be necessary to prove any prior act of uttering either by the prisoner's putting the letter into the post himself, or commissioning anybody else to do so. *R.* v. *McQuin*, 1 *Cox, C. C.* 34.

If an engraving of a forged note be given to a party as a pattern or specimen of skill, the person giving it not intending that the particular note should be put in circulation, it is not an uttering. *Per Littledale, J., Harris's case*, 7 *C. & P.* 428. In *Heywood's case*, 2 *C. & K.* 352, Alderson, B., held, that if A. give to B. a forged certificate of a pretended marriage between himself and B., in order that B. may give it to a third person, A. is not guilty of an uttering within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 20.

A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance, knowing it to be so, to the manager of a banking company with which he kept an account, saying that he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied, that would depend on the result of inquiries respecting the acceptors; Patteson, J., held it to be a sufficient uttering. *Cook's case*, 8 *C. & P.* 582.

As to uttering by several, see *ante*, p. 376.

Proof of the disposing or putting off.] Upon the words of the repealed statute of 15 Geo. 2, c. 13, s. 11, which were, "dispose of or put away," the following case was decided. The prisoners were indicted for disposing and putting away forged bank of England notes. It appeared that the prisoner, Palmer, had been in the habit of putting off forged bank notes, and had employed the other prisoner,

Hudson, in putting them off. The latter having offered a forged note in payment, in the evening of the same day, Palmer went with her to the person who had stopped it, and said, "This woman has been here to-day, and offered a two-pound note, which you have stopped, and I must either have the note or the change." It was contended for the prisoners that the evidence was of two distinct and separate offences, and not of a joint offence. The jury having found Palmer guilty of the offence of disposing and putting away the note, a case was reserved for the opinion of the judges, which was delivered by Mr. Justice Grose. He said that a difference of opinion had existed among the judges, some holding that until Hudson uttered the note it was to be considered as virtually in Palmer's possession, and that when she did utter it he was to be considered only as an accessary before the fact, and ought to have been so indicted. But a great majority of the judges were of opinion that the conviction was right. It clearly appeared that Palmer knowingly delivered the forged note into the hands of Hudson, for the fraudulent purpose of uttering it for his own use. He could not have recovered it back by any action at law. It was out of his legal power, and when it was actually uttered by her, the note was *disposed of*, and *put away* by him through her means. As delivering an instrument to another was a step towards uttering it, it seemed most consonant to the intentions of the legislature to hold that the delivery to another for a fraudulent purpose, was an offence within the words "dispose of," or "put away." *Palmer's case*, 2 *Leach*, 978; 1 *Bos. & P., N. R.* 96; *Russ. & Ry.* 72.

The same point arose, and was decided the same way, in *Giles's case*. The jury in that case found the prisoner had given the note to one Burr, and that he was ignorant of its being forged, and paid it away. The judges to whom the case was referred, thought that Burr knew it was forged; but were of opinion that the giving the note to him, that he might pass it, was a *disposing* of it to him, and that the conviction was right. 1 *Moo. C. C.* 166. Had the prisoner been charged with *uttering* instead of *disposing* of the note, it seems that, according to the view of the case taken by the judges, Burr being cognisant of the forgery, the prisoner could not have been convicted on that indictment, as in that case his offence would have been that of accessary before the fact. See *Soares's case*, *Russ. & Ry.* 25; 2 *East, P. C.* 974; *Davis's case*, *Russ. & Ry.* 113, *ante*, p. 376.

It seems that in the case of the forgery of an instrument which has effect only by its passing, the mere showing of such false instrument with intent thereby to gain credit, is not an offence within the statutes against forgery. The prisoner was indicted (under the 13 Geo. 3, c. 79) for uttering and publishing a promissory note containing the words, &c. It appeared, that in order to persuade an inn-keeper that he was a man of substance, he one day after dinner pulled out a pocket-book, and showed him the note in question, and a 50*l*. note of the same kind. He said he did not like to carry so much property about him, and begged the inn-keeper to take charge of them, which he did. On opening the pocket-book some time afterwards, the notes were found to be forged. The prisoner being convicted, the judges held that this did not amount to an uttering. In order to make it such, they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it. *Shukard's case*, *Russ. & Ry.* 200. "The words 'upon it,' we consider as equivalent to 'by means of it,' otherwise there could

hardly be an uttering of court-rolls and other instruments enumerated in the statute." *Per* Campbell, C. J., in delivering the judgment of the court in *Jones's case, infra.*

But if A. exhibit a forged receipt to B., a person with whom he is claiming credit for it, this is an uttering within the 1 Wm. 4, c. 66, s. 10, although A. refuse to part with the possession of the paper out of his hand. *R.* v. *Radford*, 1 *C. & K.* *707; *S. C.* 1 *Denison, C. C.* 59. In this latter case, which was reserved for the consideration of the judges, Pollock, C. B., said, "In all these cases reference must be had to the subject. A purse is of no use except it be given. Not so a receipt, or turnpike ticket. A promissory note must be tendered to be taken. Not so a receipt, as the person who has it is to keep it." In *Jones's case*, 2 *Den. C. C. R.* 475; *S. C.* 21 *L. J. M. C.* 166, the prisoner placed a forged receipt for poor-rates in the hands of the prosecutor for inspection, in order that by representing who had paid the rates he might induce the prosecutor to advance money to a third person. This was held to be an uttering within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 10.

The prisoner was indicted in London under the 44 Geo. 3, c. 98, for uttering forged medicine stamps. Having an order to supply medicines to certain persons at Bath, he delivered them at his house in Middlesex to a porter, to carry them to Aldersgate-street, in London, to the Bath waggon. It was objected that this was not an *uttering* by the prisoner in the city of London, and upon the argument of the case before the judges, there was a difference of opinion upon the subject, although the majority held the offence complete in London. *Collicott's case*, 2 *Leach*, 1048; *Russ. & Ry.* 212; 4 *Taunt.* 300, *S. C.*

Proof of the intent to defraud.] An intent to defraud is an essential ingredient to constitute the offence of forgery. The definition of the crime by Grose, J., on delivering the opinion of the judges, is "the false making of a note or other instrument *with intent to defraud.*" *Parkes and Brown's case*, 2 *Leach*, 775; 2 *East, P. C.* 853. So it was defined by Eyre, B., "the false making of an instrument, which purposes on the face of it to be good and valid, for the purposes for which it was created *with a design* to defraud." *Jones's case*, 1 *Leach*; 367; 2 *East, P. C.* 853. The word *deceive* has been used by Buller, J., instead of the word *defraud*: but it has been observed, that the meaning of this word must doubtless be included in that of the word defraud. 2 *East, P. C.* 853. In *Tylney's case*, 1 *Den. C. C. R.* 321, the judges were divided in opinion whether the prisoner could be convicted of forging a will without proof that the forged instrument was capable of effecting a fraud on some person or other. In *Hodgson's case*, 25 *L. J. M. C.* 78, it was held, that a man forging a diploma of the College of Surgeons, with intent to induce people generally to believe that he was a member of the college, but having no intent in the forging or uttering to commit any particular fraud or specific wrong to any individual, was not guilty of the offence of forgery at common law. And see *Nash's case*, 2 *Den. C. C. R.* 493; *S. C.* 21 *L. J. M. C.* 147.

Proof of the intent to defraud—mode of proof.] The intent is mostly evidenced by the act itself, which, from its nature, leaves in general no room for doubt upon the point. The inference is frequently confirmed by the conduct and behaviour of the guilty party, in the artifices and falsehoods which he employs for the purpose of

effecting his object, or of avoiding detection. The subsequent uttering or publication of the forged instrument is admissible, and strong evidence to prove the original design of forging the instrument, and whether the making or uttering of a forged instrument be done with an intent to injure a particular person as alleged, is matter of evidence for a jury. 2 *Stark. Ev.* 336, *2nd ed.*; *Barron's case*, 2 *East, P. C.* 989.

Proof of the intent to defraud—with regard to the party intended to be defrauded.] Formerly the averment of the intent to defraud must be pointed at the particular person or persons against whom it is meditated, and the proof must agree with such averment. 2 *East, P. C.* 988. But now by the 14 & 15 Vict. c. 100, s. 8, it is enacted, that "it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud." In *Hodgson's case, ante*, p. 490, Jervis, C. J., in giving judgment said, "The statute 14 & 15 Vict. c. 100, with reference to criminal pleading, does only that which it professes to do, alter the form of the pleadings; this case, therefore, may be treated just as if it had occurred before the statute." And see also *Nash's case*, 2 *Den. C. C. R.* 493; *S. C.* 21 *L. J. M. C.* 147.

Proof of the identity of the party whose name is forged.] It is essential to prove the falsity of the instrument, either by showing that the writing is not that of the person by whom it purports to have been made, or by showing that no such person exists; 2 *Stark. Ev.* 334, *2nd ed.*; or where the instrument is in the name of the party himself, by showing that he put it off fraudulently, as being the act of another person. Where the name forged is that of an existing person, it is necessary to disprove the making of the instrument in question by him.

It was supposed at one time, that the best evidence of the party not having made the instrument, was the party himself, and Gould and Yates, JJ., in one case directed an acquittal on that ground. *Smith's case*, 1 *Leach*, 333 (*n*).

In the following case, in order to identify the person whose name was forged as the indorser of a bill, it was thought necessary to call the drawer, for the purpose of showing that the individual in question was the party really connected with the bill. The bill had been sent to Pearce, the payee and indorser, an intimate friend of Davis, the drawer; but it never came to his hands, and it was proved to have been uttered by the prisoner, with the indorsement, "William Pearce," upon it; Davis was not called, and the testimony of Pearce was rejected by Adair, S., recorder; for although it might not be *his* handwriting, yet it might be the handwriting of a *William Pearce*, or as he had not been proved to be the person intended as the payee of the bill, it might be the handwriting of the William Pearce to whom the bill was made payable. The prisoner was accordingly acquitted. *Sponsonby's case*, 1 *Leach*, 332; 2 *East, P. C.* 996. It

has been observed upon this case, that it may be doubted whether the fact of this William Pearce being an intimate acquaintance and correspondent of the drawer, and no evidence being given of the existence of any other William Pearce, to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee. 2 *East, P. C.* 997. The decision in *Sponsonby's case* may be considered as much shaken by the following authority. The prisoner was indicted for forging a promissory note, purporting to be made by one William Holland, payable to the prisoner or order. It appeared that the prisoner had offered the note in payment to the prosecutor, who at first refused to take it, upon which the prisoner said, he need not be afraid, for it was drawn by William Holland, who kept the *Bull's Head,* at Tipton. William Holland was called, and proved that it was not his handwriting. He stated that there was no other publican of his name at Tipton, but there was a gentleman of the name of *William Holland,* living there on his means, who, for distinction, was called *Gentleman Holland.* The latter William Holland not being called, it was contended for the prisoner that there was not sufficient evidence of the note having been forged. The prisoner being convicted, on a case reserved, the judges held, that as the prisoner had stated, that William Holland, of the *Bull's Head,* was the maker (and from being payee of the note he must have known the particulars), it was sufficient for the prosecutor to show that it was not the note of that William Holland, and that it lay upon the prisoner to prove, if the case were so, that it was the genuine note of another William Holland. *Hampton's case,* 1 *Moo. C. C.* 225.

The identity of the party whose name is forged may also be established by the admission of the prisoner himself, as in the following case. The prisoner was charged with forging and uttering a bill of exchange in the name of Andrew Helme, with intent to defraud one Anthony, and also with forging an indorsement in the name of John Sowerby, on a bill purporting to be drawn by the said A. Helme, with the like intent. Some letters written by the prisoner, after his apprehension, to A. Helme, who was the prisoner's uncle, were produced, from which it clearly appeared that the name of A. Helme was forged. In the same manner the forgery of Sowerby's name appeared, and that he was the son of a person of the same name at Liverpool. A witness proved that the prisoner offered him the bill in question with the indorsement upon it, informing him that A. Helme was a gentleman of credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses. Sowerby, the father, was then called, who swore that the indorsement was not his handwriting; that he knew of no other person of the same name at Liverpool; that his son had been a cheesemonger there, but had left that town four months before, and was gone to Jamaica, and that the indorsement was not in his handwriting. It was objected, that Helme, the drawer, was not called to prove what Sowerby, the payee, was; but the prisoner was convicted. The judges, on a case reserved, held the conviction right. They said, the objection supposed that there was a genuine drawer, who ought to have been called, but to this there were two answers, 1st, that the drawer's name was forged, which the prisoner himself had acknowledged; and, 2ndly, that the prisoner himself had ascertained who was intended by the John Sowerby, whose indorsement was forged, for he represented him as a cheesemonger at Liverpool, and that he meant young Sowerby appeared from his mentioning his mother;

and it appearing not to be young Sowerby's handwriting, the proof of the forgery was complete. *Downes's case*, 2 *East*, *P. C.* 997.

In the following case also, the falsity of the instrument was proved by the admission of the prisoner. Beatty and others were indicted for a conspiracy to defraud by means of a fraudulent acceptance of a bill of exchange. The indictment averred that Beatty fraudulently wrote the acceptance. The only evidence to support this averment was that of a witness who proved that the bill, with the acceptance upon it, was shown to Beatty, who being asked whether it was a good one, answered, *very good*. The prisoners being convicted, the judges, on a case reserved, were of opinion that the confession was properly left to the jury, as evidence from which they might find the fact of his having written the acceptance, and that the conviction was right. *Hevey's case*, 1 *Leach*, 232; 2 *Leach*, *P. C.* 856 (*n*).

But where it appears that there are persons in existence residing at the place which the forged instrument refers to, the proof must be given that those persons are not in fact the real persons referred to, although in some respects they may be misdescribed. The prisoner was charged with both forging and uttering a forged acceptance. The bill was addressed thus:

To Messrs. Williams & Co.
Bankers, Birchin Lane,
3, London.

It was uncertain, on the evidence, when the figure 3 was written. The prisoner, when he paid away the bill, was asked whether the acceptors were Williams, Birch & Co., and his answers imported that they were Williams, Birch & Co., living at No. 20, Birchin Lane, and the acceptance was proved not to be theirs. Theirs was the only firm of Williams & Co., bankers in London. At No. 3, Birchin Lane, the name of Williams & Co. was on the door, and some bills addressed to Messrs. Williams & Co., bankers, Swansea, had been accepted, payable at No. 3, and paid there. There was no evidence as to who lived at No. 3, but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there. The prisoner was convicted, but the judges, on a case reserved, were of opinion that the facts proved against the prisoner did not amount to forgery. *Watts's case*, *Russ. & Ry.* 436; 3 *Brod. & Bingh.* 197.

Proof of the forged instrument.] The nature of the forged instrument must be stated in the indictment; *Wilcox's case*, *Russ. & Ry.* 50, and the proof must correspond with such statement. But any immaterial variance would be amended, sect. 14 & 15 Vict. c. 100, s. 1.

The forged instrument may also be described by its *purport*, as a paper writing *purporting* to be the particular instrument in question. 2 *East*, *P. C.* 980. By the 14 & 15 Vict. c. 100, s. 5, "in any indictment for *forging*, *uttering*, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof." In all cases the word *purport* imports what appears *on the face* of the instrument. *Id.* Where in one count the instrument was described as purporting to be a bank note, the court being of opinion that it did not on the

face of it purport to be such, held that the count could not be supported, and that the representation of the prisoner at the time he passed it off as such, could not vary the purport of the instrument itself. *Jones's case*, 2 *East*, *P. C.* 883, 981. Where a receipt was signed "C. Ollier," and the indictment stated it as purporting to be signed by *Christopher* Oliver, the court (consisting of Heath and Lawrence, JJ., and Thompson, B.,) were inclined to think there was no absolute repugnance in the statement, and they reserved the case for the judges, but no opinion was ever given. *Reeves's case*, 2 *Leach*, 808, 814; 2 *East*, *P. C.* 984 (*n.*).

Where a fictitious signature is stated, it should be described as *purporting* to be the signature of the real party. Thus, where the instrument was described as "a certain bill of exchange, requiring certain persons by the name and description of Messrs. Down, &c., to pay to the order of R. Thompson, the sum, &c., and signed by *Henry Hutchinson*, for T. G. T. and H. Hutchinson, &c., which bill is as follows," &c., and it appeared in evidence that the signature to the bill, "Henry Hutchinson," was a forgery, it was objected that the indictment averring it to have been *signed* by him, (and not merely that it *purported* to be signed by him,) which was a substantial allegation, was disproved, and so the judges held, on a reference to them after conviction. *Carter's case*, 2 *East*, *P. C.* 985.

Where the particular nature of the instrument is misdescribed, the variance, unless amendable, is of course fatal. The indictment charged the prisoner with forging "a promissory note for payment of money which is as follows." The instrument appears to be in the following form.

"Two months after date, pay Mr. B. H. or order, the sum of 28*l.* 15*s.* value received.

"At Messrs. Spooner and Co.'s, Bankers, London." JOHN JONES.

The prisoner being convicted, the judges, on a case reserved, held that the instrument was a bill of exchange, and not a promissory note, and that the conviction was wrong. *Hunter's case*, *Russ.* & *Ry.* 511.

A bank post bill must not be described as a *bill of exchange*, but it is sufficiently described by the designation of a *bank* bill of exchange. *Birkett's case*, *Russ.* & *Ry.* 251.

By the 2 & 3 Wm. 4, c. 123, s. 3, (U. K.) it is enacted, "that in all informations or indictments for forging, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or *fac simile* thereof, but it shall be sufficient to describe the same, in such manner as would sustain an indictment for stealing the same, any law or custom to the contrary notwithstanding."

Where an indictment for forgery charged that the prisoner "did forge a certain promissory note for the payment of 50*l.*" without stating it to be of any value; Patteson, J., said that the court must take judicial notice of what a promissory note is, and held the description to be sufficient. *James's case*, 7 *C.* & *P.* 553. With reference to this statute, it was held, that an instrument payable to the order of A., and directed "at Messrs. P. and Co., bankers," may be described as a bill of exchange; *Smith's case*, 2 *M. C. C. R.* 295; that "a deed purporting to be a lease of certain premises," is a sufficient

description; *Davies's case*, 2 *M. C. C. R.* 177. So "a request for the delivery of goods;" *Robson's case*, 2 *M. C. C. R.* 182; that the instrument may be declared as a deed, without assuming that it is one which may be the subject of larceny; *Collins's case*, 2 *M. & Rob.* 461; that an indictment charging that the prisoner "did forge a writing as a certificate of W. N., with intent to deceive and defraud W. P. and others," was good. *Toshock's case*, 1 *Den. C. C. R.* 492.

If an instrument is set out in full in the indictment, the description of its legal character would appear to be surplusage. Thus in *Williams's case*, 2 *Den. C. C. R.*; 61 *S. C.* 20 *L. J. M. C.* 106, the prisoner was indicted for forging a certain warrant order and request in the words, &c., following: "Please to send by bearer a quantity of basket nails and clasps for E. Lloyd:" it was proved to be only a request. Pollock, C. B., in delivering the judgment of the court, said, "The case has stood over to enable the court to see a copy of the indictment. The judges find that the instrument was set out in *hæc verba*, and therefore the only ground of doubt being removed, the conviction must be affirmed."

It will be no variance, if it appear that the instrument which is described in the indictment as a forged instrument, was originally a genuine one, but that it has been fraudulently *altered* by the prisoner; for every alteration of a true instrument for a fraudulent purpose makes it, when altered, a forgery of the whole instrument. *Teague's case*, 2 *East*, *P. C.* 979. Thus where the prisoner altered a figure of 2 in a bank note into 5, the judges agreed that it was forging and counterfeiting a bank note, forgery being the alteration of a deed or writing in a material part, to the prejudice of another, as well as when the whole deed or writing is forged. *R.* v. *Dawson*, 2 *East*, *P. C.* 978. In practice, however, forgeries of this kind are stated, in one count at least, as alterations. 2 *East*, *P. C.* 986; 2 *Russ. by Grea.* 288.

Proof with regard to principals and accessaries.] Although, in general, it is necessary, in order to render a party guilty as principal in an offence, that he should have been present at the commission of the complete act, yet it is otherwise in forgery, where a person may incur the guilt of a principal offender by bearing a part only in the committing of the act, and in the absence of the other parties. Thus where the prisoner impressed the water-marks, the date, line, and number, on forged bank-notes, and the other requisites were added at different times, and by different parties, not in the presence of the prisoner; on conviction, the judges were of opinion that the conviction was right; that each of the offenders acted in completing some part of the forgery, and in pursuance of the common plan each was a principal in the forgery, and that though the prisoner was not present when the note was completed by the signature, he was equally guilty with the others. *Bingley's case*, *Russ. & Ry.* 446. Nor does it make any distinction in the case, that the prisoner was ignorant of those who were to effect the other parts of the forgery; it is sufficient to know that it is to be effected by somebody. *Kirkwood's case*, 1 *Moo. C. C.* 304; *Dade's case*, *Id.* 307.

But where three persons were jointly indicted under the 11 Geo. 4, & 1 Wm. 4, c. 66, s. 19, see *post*, p. 524, for feloniously using plates containing impressions of foreign notes, it was held by Littledale, J., that the jury must select some one particular time after all

three had become connected, and must be satisfied in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. *Harris's case*, 7 *C. & P.* 416.

Where three prisoners were indicted under the same section for feloniously engraving a promissory note of the Emperor of Russia, and it appeared that the plates were engraved by an Englishman, who was an innocent agent, and two of the prisoners only were present at the time when the order was given for the engraving of the plates; but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction; it was held that in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. *Mazeau's case*, 9 *C. & P.* 676; 2 *Russ. by Grea.* 370.

With regard to the offence of *uttering* forged instruments, it is necessary, in order to render a party guilty as principal, that he should have been present. *Soare's case*, 2 *East, P. C.* 974, *ante*, p. 376. Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged order and certificate for the payment of prize-money, it was held by the judges, that the presumption of coercion on the part of the husband did not arise; that she might be indicted as principal, and her husband as accessary before the fact. *Morris's case*, *Russ. & Ry.* 270; 2 *Leach*, 1096. So an assent afterwards does not render the party guilty as a principal. 1 *Hale, P. C.* 684; 2 *East, P. C.* 973. But in forgery at common law, which is a misdemeanor, as in other cases of misdemeanor, those who, in felony, would be accessaries, are principals. 2 *East, P. C.* 973.

As to trial and punishment of accessaries before and after the fact to a felony, see *ante*, pp. 209 and 212.

Proof of guilty knowledge.] Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, evidence of that guilty knowledge must be given on the part of the prosecution; and for that purpose the uttering or having possession of similar forgeries will be admissible. Most of the cases upon this subject have been already stated. *Ante*, pp. 87 to 92.

On an indictment for forging and uttering a forged bill, a letter written by the prisoner after he was in custody, to a third party, saying that such party's name is on another bill, and desiring him not to say that the latter bill is a forgery, is receivable in evidence to show guilty knowledge, but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it proved in the usual way. *Per Coleridge J.*, *Forbes's case*, *C. & P.* 224. So it was held by Patteson, J., that evidence of what the prisoner said respecting other bills of exchange, which are not produced, is not admissible. *Cooke's case*, 8 *C. & P.* 586.

Venue.] It was formerly necessary to lay the venue in the county where the forgery was committed; and as it was frequently difficult to procure direct proof of the act of forgery, much inconvenience was occasioned; see 2 *Russ. by Grea.* 389. But now by the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 24, "if any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every accessary before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

Under the above section, which states that the offence may be "laid and charged to have been committed in any county or place in which the offender shall be apprehended or be in custody;" Patteson, J., held it to be sufficient to prove that the party was in custody in the county where he was tried, and that the indictment need not contain any averment of his being in custody there. *James's case*, 7 *C. & P.* 553. So in *Smythes's case*, 1 *Den. C. C. R.* 498; *S. C.* 19 *L. J. M. C.* 31, the prisoner was not shown to have been in custody till he surrendered just before the trial. The jury found that he was guilty of forging, but that there was no evidence of its having been done within the jurisdiction of the court; this finding was held to amount to a conviction.

Venue.—Forgery of documents not made, or purporting to be not made in England.] The offence of uttering in England documents forged abroad, is provided against by the 30th section of the 11 Geo. 4 & 1 Wm. 4, c. 66, by which it is declared and enacted, "that where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off, any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in that part of the United Kingdom called England, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of England, whether under the dominion of his majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same, or any part thereof, may be expressed, every such person, and every person, aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made, or had been made in England; and if any person shall in England forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any

bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose,) in whatever place or country out of England, whether under the dominion of his majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order, be or be not under seal; every such person and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England."

An indictment under this section for uttering a forged foreign promissory note need not allege it to be payable out of England. *R.* v. *John Lee*, 2 *Moo. & R.* 281.

As to engraving foreign bills, &c., see *post*, p. 524.

Interpretation of the statute 11 *Geo.* 4 & 1 *Wm.* 4, *c.* 66.] The 11 Geo. 4 & 1 Wm. 4, c. 66, contains the following clause (sec. 28) with regard to the interpretation of various words used in the act. And be it declared and enacted, "that where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his majesty or any foreign prince, or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever, who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons, shall reside or carry on business in England or elsewhere in any place or country, whether under the dominion of his majesty or not; and it shall be sufficient in an indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named and another, or others, as the case may be."

Punishment.] By the 11 Geo. 4 & 1 Wm. 4, c. 66 (E.), s. 1, the punishment of death was abolished for all forgeries not made capital by that act, and it is thereby enacted, that in all cases not made punishable with death by the act, every person convicted of any such offence, or of aiding, abetting, counselling, or procuring the commission thereof, should be liable to be transported beyond the seas

for life, or for any term not less than seven years, or be imprisoned for any term not exceeding four years, nor less than two years.

By s. 26, "where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded," the court may direct such imprisonment to be with or without hard labour, and may also add solitary confinement; but such solitary confinement cannot now exceed a month at a time, and three months in any one year.

By the 2 & 3 Wm. 4, c. 123 (U. K.), s. 1 (after reciting the 11 Geo. 4 & 1 Wm. 4, c. 66), it is provided, that "where any person shall, after the passing of this act, be convicted of any offence whatsoever, for which the said act enjoins or authorises the infliction of the punishment of death, or where any person shall, after the passing of that act, be convicted in Scotland or Ireland of any offence now punishable with death, which offence shall consist wholly, or in part, of forging or altering any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then, and in each of the cases aforesaid, the person so convicted of any such offence as aforesaid, or of procuring, or aiding, or assisting in the commissson thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of such offender's life."

By s. 2, it is enacted, that "notwithstanding any thing hereinbefore contained, this act shall not be construed to affect or alter the said recited act, or any other act or law now in force, so far as the same may authorise the punishment of death, to be inflicted upon any persons convicted either in England, Scotland, or Ireland, of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate, or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of, or in any stock, annuity, or other public fund, which now is, or hereafter may be transferable at the bank of England, or South Sea House, or at the bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment for each and every of the said offences, and for procuring, aiding, or assisting in the commission thereof, shall continue to be the same, as if this act had not been passed."

Now by the 7 Wm. 4 & 1 Vict. c. 84 (U. K.), entitled, "An act to abolish the punishment of death in cases of forgery," after reciting the said statutes of the 11 Geo. 4 & 1 Wm. 4, c. 66, and the 2 & 3 Wm. 4, c. 123, s. 2; and also the 2 & 3 Wm. 4, c. 59, s. 19; the 2 & 3 Wm. 4, c. 125, s. 64; the 5 & 6 Wm. 4, c. 45, s. 12; and the 5 & 6 Wm. 4, c. 51, s. 5; whereby the forgeries therein specified were punishable capitally, see *post*, it is enacted that "if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

By s. 2, after reciting the first section of the said statute of the 2 & 3 Wm. 4, c. 123; and also the 3 & 4 Wm. 4, c. 44, and the 3 & 4 Wm. 4, c. 51, s. 27; it is enacted that so much of the said three lastly hereinbefore in part recited acts as relates to the punishment of persons convicted of offences for which they are liable under the said act of the 2 & 3 Wm. 4, c. 123, or the said act of the 3 & 4 Wm. 4, c. 51, respectively, to be transported for life, shall, from and after the commencement of this act, be repealed; and that from and after the passing of this act every person convicted of any of such offences shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years.

By s. 3, in cases of imprisonment, the court may award hard labour, and also solitary confinement, not exceeding one month at any one time, and not exceeding three months in any one year.

It is to be observed, that the 11 Geo. 4 & 1 Wm. 4, c. 66, only applies to forgeries which were punishable with death at the time of the passing of that act, and consequently other forgeries not so punishable retain the punishments provided by the respective statutes in which they are contained, qualified as to solitary confinement by the 7 Wm. 4 & 1 Vict. c. 90, s. 5.

The various forgeries which, by the 11 Geo. 4 & 1 Wm. 4, c. 66, were not made punishable with death, also retain the punishments affixed to them by that act.

FORGING OF PARTICULAR INSTRUMENTS.

FORGING WILLS.

By the 3rd section of the 1 Wm. 4, c. 66, the forging or uttering, &c., of "any will, testament, codicil, or testamentary writing," was punishable with death, and continued so under the 2 & 3 Wm. 4, c. 123; but see now, *ante*, p. 499.

It is to be observed, that although this act of the 1 Wm. 4, c. 66, does not extend to Scotland or Ireland, yet it applies to the forging or uttering in England of documents purporting to be made, or actually made out of England, and to the forging or uttering in England bills of exchange, promissory notes, bonds, &c., purporting to be payable out of England, ss. 29, 30.

The Irish statutes against the forgery of wills are the 3 Geo. 2, c. 4, and the 17 Geo. 2, c. 11, the punishment being modified as at p. 499.

It is no less a forging of a will, that the party whose name is forged is living. *Coogan's case*, 1 *Leach*, 449; 2 *East*, *P. C.* 948. So it has been held by Patteson, J., that the will of a non-existing person is an offence within the above act. *Avery's case*, 8 *C. & P.* 596.

Where it appeared that the will was a will of land, and attested by

two witnesses only, it was held there was no forging. *Wall's case*, 1 *Leach*, 449; 2 *East*, *P. C.* 948, 953; but now, by the 7 Wm. 4 & 1 Vict. c. 26, two witnesses are sufficient.

Where the prisoners were indicted for forging the will of *Peter* Perry, and it appeared that the will began, "I, *Peter* Perry," and ended,

his
John ⋈ Perry,
mark.

It was objected, that this was not the will of *Peter* Perry; but the prisoners being convicted, the judges held the conviction right. *Fitzgerald's case*, 2 *East*, *P. C.* 953. A probate, unrevoked, is not conclusive proof of the validity of the will, and its repeal need not be proved. *Buttery's case*, *Russ. & Ry.* 342.

In *Tylney's case*, 1 *Den. C. C. R.* 321, the judges were divided in opinion upon the question, whether the prisoner could be convicted of forging a will, without proof that the forged instrument was capable of effecting a fraud on some person or other. As to what evidence is admissible, see *Williams's case*, *ante*, p. 171.

FORGING DEEDS.

The forging of "any deed, bond, or writing obligatory, or any court-roll, or copy of court-roll," is made subject to transportation for life, or for any term not less than seven years, or imprisonment for not more than four, nor less than two years, &c., by the 10th section of the 1 Wm. 4, c. 66.

The Irish statutes against the forgery of deeds, &c., are the same as those with regard to wills (see above), the punishment being modified as at p. 499.

On an indictment against accessaries before the fact to the forging of an administration bond, on administration granted for the effects of J. C., it was objected that the 22 & 23 Car. 2, c. 10, requiring the bond to be given by the party to *whom administration was granted*, and not by the party *that was entitled to administration*, the bond could not be treated as a forgery, but was a good bond within the statute, having been given by the party to whom, in fact, administration was granted. The objection was overruled. *R.* v. *Barber*, 1 *C. & K.* 434.

The forging of a power of attorney to receive a seaman's wages, was held to be the forgery of a deed within the repealed statute, 2 Geo. 2, c. 25. *Lewis's case*, 2 *East*, *P. C.* 957. So a power of attorney for the purpose of receiving prize-money. *Lyon's case*, *Russ. & Ry.* 255, *ante*, p. 483. In the same manner, a power of attorney to transfer government stock; *Fauntleroy's case*, 1 *Moo. C. C.* 56; 2 *Bingh.* 413; and an indenture of apprenticeship; *Jones's case*, 2 *East*, *P. C.* 991; 1 *Leach*, 366. Where a forged deed is altered, the party may be convicted for forging and uttering it in the state in which it was so altered. *Kinder's case*, 2 *East*, *P. C.* 855.

Though the instrument in question may not comply with the directory provisions of a statute, it may still be described as a deed. *Lyon's case*, *Russ. & Ry.* 255, *ante*, p. 483.

FORGING BILLS OF EXCHANGE, PROMISSORY NOTES, AND UNDERTAKINGS, WARRANTS, OR ORDERS FOR PAYMENT OF MONEY, &c.

By the 11 Geo. 4 & 1 Wm. 4 (E.), c. 66, s. 3, it is enacted (*inter alia*), that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on, or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof [shall suffer death as a felon]. For the present punishment, see *ante*, p. 498.

By the fourth section, if any instrument, however designated, is in law a bill of exchange, or promissory note for the payment of money, or an acceptance, &c., or an undertaking, &c., within the intent and meaning of the act, the person forging, &c., may be indicted as an offender against the act, and punished accordingly.

The above offences, and those included in the tenth section, *post*, are provided against in Ireland by the 39 Geo. 3, c. 63, the punishment being modified by the 2 & 3 Wm. 4, c. 123, s. 1, *ante*, p. 498.

Proof of forging bills of exchange, promissory notes, &c.] If A. put the name of B. on a bill of exchange as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it, this is forgery; but if A. either had authority from B., or from the course of their dealing *bonâ fide* considered that he had such authority, it is not a forgery. *Per Coleridge, J., Forbes's case*, 7 *C. & P.* 224. The fact that on three or four previous occasions when the prisoner had drawn bills in that way, the party whose name was used had paid them without remark or remonstrance, would afford fair ground for the belief that he had such authority. *Per Coleridge, J., Beard's case*, 8 *C. & P.* 143. But if a person, relying on the kindness of another (a near relation for instance), use his name on a bill without authority, trusting that such individual will pay it rather than there should be a criminal prosecution on the subject, this is forgery. *Id. Parish's case*, 8 *C. & P.* 94, *S. P.*

If a person having the blank acceptance of another, be authorised to write on it a bill of exchange for a limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, this is forgery. *Hart's case*, 7 *C. & P.* 652. So where a party receives a blank cheque signed, with directions to fill in a certain amount, and to appropriate the instrument to a certain purpose, and he fraudulently fills in a different amount, and devotes the cheque to other purposes, he commits forgery. *R.* v. *Bateman*, 1 *Cox, C. C.* 186; and this, though he *bonâ fide* believes that the larger amount was due to him for salary, and retains the proceeds of the cheque. *Wilson's case*, 1 *Den. C. C. R.* 284; *S. C.* 17 *L. J. M. C.* 82. What is, or is not a false making of a bill of exchange is a question of law. *Hart's case, supra.*

A. being in want of 1000*l.* applied to B., who drew a bill for that amount, which A. accepted, payable three months after date. In a

few days B. came to A., and said he could not get the 1000*l.* bill discounted, as it was too large, and proposed that two bills for 500*l.* each should be substituted. One bill for 500*l.* was drawn by B., and accepted by A. B. upon this pretended to destroy the 1000*l.* bill in A.'s presence, but did not do so in fact; on the contrary, he subsequently altered it from a bill at three, to a bill at twelve months: it was held by Park, J., that this was forgery in B. with intent to defraud A. *Atkinson's case*, 7 *C. & P.* 669.

Putting an address to the name of a drawer of a bill of exchange, while the bill is in the course of completion, with intent to make the acceptance appear to be *that of a different existing person*, is forgery. *Blenkinsop's case*, 1 *Den. C. C. R.* 276; *S. C.* 17 *L. J. M. C.* 62.

If the prisoner write another's name across a blank stamp, on which, after he is gone, a third person who is in league with him, writes a bill of exchange; *semble*, that this is not a forgery of the acceptance of a bill of exchange by the prisoner. *Cooke's case*, 8 *C. & P.* 582. So where the prisoner, who was a partner in a firm, was indicted for forging an acceptance of a bill of exchange, and it appeared that another party, by the direction of the prisoner, had written the name of a customer across a blank stamp, on which the prisoner some time subsequently drew a bill of exchange in the name of the firm; Parke, B., held that this was not a forgery of an acceptance of a bill of exchange within the statute, which does not make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange. *Butterwick's (second) case*, *Durham Spring Ass.* 1839, *MS.*, 2 *Moo. & R.* 196.

In order to bring the case within the statute, the instrument in question, which is laid to be a bill of exchange or promissory note, must purport on the face of it to be legally such. Where the instrument was in the following form:—"I promise to pay the bearer, one guinea on demand, here in cash, or a Bank of England note;" the judges were of opinion, that this was not a note for the payment of money within the repealed stat. 2 Geo. 2. c. 25, the guinea being to be paid in cash or a bank of England note, at the option of the payer. *Wilcock's case*, 2 *Russ.* 456. But it is not necessary, in order to constitute a promissory note for the payment of money within the statute, that it should be negotiable. The prisoner was convicted under the 2 Geo. 2, c. 25, of forging a promissory note, in the following form:—

"On demand, we promise to pay to Mesdames S. W. and S. D., stewardesses, for the time being, of the Provident Daughters' Society, held at Mr. Pope's, or their successors in office, 64*l.*, value received. "For C. F. and Co.,
"J. F."

It was moved in arrest of judgment, that this was no promissory note; but the judges were of a different opinion, saying, that it was not necessary that it should be negotiable, and that it was immaterial whether the payees were legally stewardesses, and that their successors could not take the note. *Box's case*, 2 *Russ.* 460; *Russ. & Ry.* 300; 6 *Taunt.* 325.

So the offence will amount to forgery where the bill of exchange is not in a negotiable state, from being drawn by the prisoner in his own favour, and not indorsed by him. The prisoner was charged with forging a bill, purporting to be drawn by Atherton and Co., of Preston, on Denison and Co., of London, payable to himself. The intent charged was, in one count, to defraud Atherton and Co., and

in another count, to defraud one M. Yates. It appeared that the prisoner had placed the bill in the hands of Mrs. Yates, an innkeeper, as a security for his account, without indorsing it. The judge (Mr. Baron Graham) told the jury, that the use made by the prisoner of the instrument, was conclusive evidence of his fraudulent intent, and the jury found a verdict of guilty. The judge afterwards respited the sentence, doubting whether he ought not to have left the question of fraudulent intention more open to the jury, in which case they might have found that the prisoner did not mean to defraud any person, but by paying his reckoning, and taking his bill, to make no further use of it. On a reference to the judges, however, they were of opinion, that the facts amounted to forgery, and with a fraudulent intent, the bill having been given to the landlady to obtain credit, though as a pledge only. *Birkett's case, Russ. & Ry.* 86.

Even before the late statute (11 Geo. 4 & 1 Wm. 4, c. 66, s. 4), it was held, that the instrument was not the less a bill of exchange if, containing the requisites which constitute a bill of exchange in law, it professed also to be drawn in pursuance of some particular statute, with the requisitions of which it failed to comply. Thus a bill drawn upon commissioners of the navy for pay, was held to be a bill of exchange, although it was not such an instrument as was warranted by the 35 Geo. 3, c. 94. *Chisholm's case, Russ. & Ry.* 297.

It has been already stated, that where the instrument alleged to be a promissory note is not signed, it cannot be treated as such. *Pateman's case, Russ. & Ry.* 455, *ante*, p. 485. So where the name of the payee is in blank. *Randall's case, Russ. & Ry.* 195, *ante*, p. 487. So an instrument for the payment of money under 5*l.*, but unattested. *Moffat's case*, 1 *Leach*, 431, *ante*, p. 486.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum, at a certain time, "without acceptance," is a bill of exchange, and may be so described in an indictment for forgery. *Per Patteson, J., Kinnear's case*, 2 *Moo. & Rob.* 117.

The forgery of a bill of exchange does not include that of the acceptance. *Butterwick's case, Durham Spring Assizes*, 1839, *per Parke, B.*

A document in the ordinary form of a bill of exchange, but requiring the drawer to pay his own order ("please to pay to your order"), and purporting to be indorsed by the drawer, and accepted by the drawer, is not a bill of exchange for which an indictment can be sustained. *Per Erskine, J., Bartlett's case*, 2 *Moo. & R.* 362; and see *R.* v. *Smith*, 1 *C. & K.* 700.

The forgery of a single indorsement on the back of a bill of exchange, made payable to the party whose name is forged, together with several others, as executrixes, is within the third section. *R.* v. *Winterbottom*, 1 *Cox, C. C.* 164; 1 *Den. C. C. R.* 41.

As to the forging of foreign bills, &c. *vide ante*, p. 492, and *post*, p. 524.

Proof of forging undertakings, orders, or warrants for the payment of money, &c.] An undertaking to pay a sum which is uncertain and dependent upon a contingency, is within the third section of the statute; *ante*, p. 502.

Thus where the undertaking was to pay W. B. 100*l.*, "or such other sum of money, not exceeding the same, as he may incur, or be put into for or by reason or means of his becoming one of the sureties

to M. M., Esq., sheriff elect for the county of Y.; the judges held it to be within the act. *R.* v. *Reed*, 8 *C. & P.* 623.

Forging an *indorsement* upon a warrant or order for the payment of money, is not within the above section. *R.* v. *Arscott*, 6 *C. & P.* 408.

Previously to the 2 & 3 Wm. 4, s. 3, *ante*, p. 494, in an indictment under the same section, for forging an order for the payment of money, it must have appeared, either upon the face of the instrument itself, or by proper averments, that the instrument bore the character of an order. The prisoner was charged with forging "a certain order for payment of money, as follows:

"Gentlemen, London, April 24, 1809.
"Please to pay the bearer, on demand, fifteen pounds, and accompt it to

"Your humble servant,
"Charles H. Ravenscroft,

"Payable at Messrs. Masterman & Co.'s,
"White Hart Court,
"Wm. Mc Inerheney."

The prisoner being convicted, a majority of the judges, on a case reserved, held that this was not an order for the payment of money, but Mansfield, C. J., Wood, B., and Graham, B., held that it was. *Ravenscroft's case Russ. & Ry.* 161.

A paper in the following form, "Mr. Johnson, Sir, please to pay to James Jackson the sum of 13*l.* by order of Christopher Sadler, Thornton-le-Moor, brewer. I shall see you on Monday. Yours obliged, Chr. Sadler, The District Bank," was held, on a case reserved, to be an order for the payment of money within the 1 Wm. 4, c. 66, s. 3; Sadler being proved to be a customer of the District Bank, whose draft, if genuine, would have been paid, although, as at the time of the forgery, he had no effects in the bank. *Carter's case*, 1 *C. & K.* 741; *S. C.* 1 *Den. C. C. R.* 65. See also *Vivian's case*, 1 *C. & K.* 719; *S. C.* 1 *Den. C. C. R.* 35; where it was held by the judges on consideration, that "any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not." See also *Ferguson's case*, 1 *Cox, C. C.* 211.

To constitute an order for the payment of money, within the statute, it is not necessary that the instrument should specify in terms the amount ordered to be paid. Where the order was, "Pay to Mr. H. Y., or order, all my proportions of prize-money due to me for my services on board his Majesty's ship Leander," it was objected, that this was not an order for the payment of money, as no sum of money was mentioned, but the prisoner was convicted, and the judges held the conviction right. *M'Intosh's case*, 2 *East, P. C.* 942.

In the construction of the words "warrant" and "order" for the payment of money, it has been held, that instruments, which in the commercial world have peculiar denominations, are within the meaning of those words, if they be, in law, orders or warrants. 2 *East, P. C.* 943. Thus a bill of exchange may be described as an

order for the payment of money; for every bill of exchange is, in law, an order for the payment of money, though not *vice versâ*. *Lockett's case*, 2 *East*, *P. C.* 940, 943; 1 *Leach*, 94; *Sheppard's case*, 2 *East*, *P. C.* 944; 1 *Leach*, 226. So a bill of exchange is a "warrant for the payment of money," and may be described in the indictment as such; for, if genuine, it would be a voucher to the bankers or drawers for the payment. *Willoughby's case*, 2 *East*, *P. C.* 944.

A forged paper purporting to be an authority signed by three officers of a benefit club, to receive the money of the club lodged in a bank, was held, on a case reserved, to be well described in some counts as a *warrant*, and in others as an *order* for the payment of money. *Reg.* v. *Harris and another*, 2 *Moo. C. C. R.* 267. A post-dated cheque is an order for the payment of money. *R.* v. *Taylor*, 1 *C. & K.* 213.

The prisoner was indicted for forging a certain order for the payment of money; that is to say,

"Mr. Thomas,

"Sir—You will please pay to the bearer, for Rd. Power, three pounds, for three weeks, due to him, a country member, and you will much oblige, yours, &c.

"J. Beswick.

"To Mr. Thomas, Gray's Inn Lane."

The indictment then averred an intent to defraud J. Thomas, who had in his hands a large sum of money belonging to a friendly society. Beswick, whose name was forged, was secretary to the society, and he proved that there was no person named Rd. Power, a member. No evidence was given of the rules of the society. The recorder, in the absence of such evidence, thought that there was nothing to prove that Beswick had any disposing power over the money in the hands of Thomas; and upon a case reserved, the judges (except Gaselee and Parke, JJ.) held, that this was not an order on the face of it, and that the conviction was wrong. *Baker's case*, 1 *Moo. C. C.* 231. Upon the same principle it was held, that a forged order, for the purpose of obtaining a reward for the apprehension of a vagrant, not being under seal as required by the statute 17 Geo. 2, c. 5, s. 5 (repealed), and not being directed to the high constable, was not an order for the payment, although orders in that form had generally been acted upon. Bayley, J., before whom the prisoner was tried, said, to bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case the party, looking at the act, must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order; and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no right to make such an order; if he had any, it was derived from the statute; but he had no power to make such an order as this; and if such a one had been made, the treasurer ought not to have obeyed it. *Rushworth's case*, 2 *Russ. by Grea.* 547. On a reference to the judges, they held that this direction was right. *Russ. & Ry.* 317; see *Froud's case*, *Russ. & Ry.* 389.

Where the forged instrument does not purport on the face of it to be an order, and the party in whose name it is drawn, has not the

right to command payment, it is not an order for the payment of money within the 1 Wm. 4, c. 66, s. 3. *R.* v. *Roberts*, 2 *Russ. by Grea.* 522; *Carr. & M.* 652; 2 *Moo. C. C.* 258.

If the instrument purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person be in existence as the order purports to be made by, it is still an order within the statute. 2 *East, P. C.* 940. The prisoner, Charles Lockett, was convicted of uttering a forged order for the payment of money, as follows: "Messrs. Neale and Co., Pay to Wm. Hopwood, or bearer, 16*l.* 10*s.* 6*d.* R. Vennist." The prisoner had given this order in payment for goods. No such person as Vennist kept cash with Neale and Co.; nor did it appear that there was any such person in existence. The judges, on considering the case, held it to be a forgery. They thought it immaterial whether such a man as Vennist existed or not; or if he did, whether he kept cash with Neale and Co. It was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. *R.* v. *Lockett*, 2 *East, P. C.* 940; 1 *Leach*, 94. In *Dawson's case*, 2 *Den. C. C. R.* 75; *S. C.* 20 *L. J. M. C.* 102, the document was in the following form: "Mr. Lowe, London. Bought of C. Dawson, English and Foreign fruit merchant, two bushels of apples, 9*s.* Nov. 9. Sir, I hope you will excuse me sending for such a trifle; but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours &c., F. Dawson." It was proved at the trial, that Mr. Lowe was indebted to F. Dawson, who carried on business in the name of C. Dawson, in the sum of nine shillings for two bushels of apples; that the document was forged and uttered to Mr. Lowe as a genuine instrument coming from F. Dawson, with the intention of fraudulently obtaining from Mr. Lowe the above sum. The document was held to be a warrant. In that case, Jervis, C. J., stated the test to be, whether "if this had been a genuine document, and payment had been made on its production, proof of those facts would have been a good defence to an action."

A letter of credit, on which the correspondents of the writer of it, having funds of his in their possession, apply them to the use of the party in whose favour it is given, was held by the judges to be a warrant for the payment of money within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 3. *Raake's case*, 8 *C. & P.* 626; 2 *Moo. C. C.* 66. A forged paper was in the following form: "To M. and Co. Pay to my order, two months after date, to Mr. I. S. the sum of 80*l.* and deduct the same out of my account." It was not signed; but across it was written, "Accepted, Luke Lade;" and at the back the name and address of I. S. M. and Co. were bankers, and Luke Lade kept cash with them. It was held, on a case reserved, that this paper was a warrant for the payment of money; as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to I. S. *R.* v. *Smith*, 1 *C. & K.* 700; *S. C.* 1 *Den. C. C. R.* 79.

An instrument containing an order to pay the prisoner or order a sum of money, being a month's advance on an intended voyage, as per agreement with the master, in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, is an order for the payment of money within the 1 Wm. 4, c. 66, s. 3. *Bamfield's case*, 1 *Moo. C. C.* 416.

The prisoner was charged with forging "a certain warrant *and*

order for the payment of money." The instrument in question was a forged cheque upon a banker. Is was objected that this charged an offence with regard to two instruments; but Bosanquet, J., was of opinion, that the indictment was sufficient. He thought the instrument was both a warrant and an order; a warrant authorising the banker to pay, and an order upon him to do so. *Crowther's case*, 5 *C. & P.* 316; and *Taylor's case*, 1 *C. & K.* 213. So a post office money-order is within the section. *Gilchrist's case*, *Carr. & M.* 224. So also a sailor's shipping note. *Anderson's case*, 2 *M. & Rob.* 469, *ante*, p. 456.

An indictment describing the forged order as being for the payment of 85*l.* is good, although it appears that by the course of business, the bank where it is payable would pay that sum with interest. *R.* v. *Atkinson*, *Carr. & M.* 325.

Nor will the order be less the subject of forgery on account of its not being available, by reason of some collateral objection not appearing on the face of it. 2 *Russ. by Grea.* 352. The prisoner was convicted of forging an order for the payment of money, and it appeared that the party whose name was forged was a discharged seaman, who was at the time the order was dated within seven miles of the place where his wages were payable; under which circumstance his genuine order would not have been valid, by virtue of the statute 32 Geo. 3, c. 34, s. 2. The judges, however, held the conviction proper, the order itself, on the face of it, purporting to be made at another place beyond the limited distance. *M'Intosh's case*, 2 *East, P. C.* 942; 2 *Leach*, 883: 2 *Russ. by Grea.* 352.

In *Snelling's case*, 1 *Dears. C. C. R.* 219; *S. C.* 23 *L. J. M. C.* 8, the forged document was in the following form: "Holton, Mar. 31, 1853,—Sirs, please to pay the bearer, Mrs. J., the sum of 854*l.* 10*s.* for me, J. R." It was held, that although not addressed to any one, it might be shown, by parol evidence, for whom the document was intended, and this appearing to be the banker with whom J. R. kept an account, the document was an order for the payment of money.

So it is no defence to an indictment for forging and uttering an order of a board of guardians for the payment of money, to show that the person who signed the order as presiding chairman, was not in fact chairman on the day he signed, the forgery charged being of another name in the order. *R.* v. *Pike*, 2 *Moo. C. C.* 70.

But an indictment for forging an order for relief to a discharged prisoner, under the 5 Geo. 4, c. 85, which was in many respects ungrammatical and at variance with the act, was held bad. *Donelly's case*, 1 *Moo. C. C.* 438.

The 1 Wm. 4, c. 66, s. 3, does not comprise the forging of a request for the payment of money, and such a request cannot be described as an undertaking warrant, or order for the payment of money. *R.* v. *Thorn*, 2 *Moo. C. C.* 210.

A scrip certificate of a railway company is not an undertaking for the payment of money. *West's case*, 1 *Den. C. C. R.* 258.

An undertaking by a supposed party to the instrument for the payment of money by a *third* person is within the section. Therefore, where the supposed maker of a forged instrument undertook, in consideration of goods to be sold to R. P., to guarantee to the vendor the due payment of such goods; this was held to be the forgery of an undertaking for the payment of money. *Stone's case*, 1 *Den. C. C. R.* 181.

FORGING WARRANTS, ORDERS, OR REQUESTS, FOR THE DELIVERY OF GOODS, &c.

By the 11 Geo. 4 and 1 Wm. 4, c. 66, s. 10, "if any person shall forge, or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged, or alter, any warrant, order, or request, for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such person shall be guilty of felony, &c., the punishment being transportation for life, or not less than seven years, or imprisonment for four, and not less than two years."

It seems, says Mr. East, to be now settled, that if the warrant or order do not purport on the face of it, or be shown by proper averments, (but this may now be matter of evidence, see *ante*, p. 494,) to be made by one having authority to command the payment of the money, or direct the delivery of the goods, and to be compulsory on the person having possession of the subject-matter of it; but only purport to be a request to advance the money, or supply the goods on the credit of the party applying, which the other may comply with or not, as he thinks proper, it is not a warrant or order within the statute. 2 *East, P. C.* 936. Thus, a note in the name of an overseer of the poor to a shop-keeper, desiring him to let the prisoner have certain goods, which he would see him paid for, was held not to be a warrant or order for the delivery of the goods within the statute (7 Geo. 2, c. 22). The judges, on a case reserved, said, that the words "warrant or order," as they stood in the act, were synonymous, and imported that the person giving such warrant or order had, or at least claimed, an interest in the money or goods which were the subject-matter of it, and had, at least, assumed to have a disposing power over them, and took upon himself to transfer the property, or, at least, the custody of them to the person in whose favour such warrant or order was made. One of the judges doubted, and another of their lordships dissented. *Mitchell's case*, 2 *East, P. C.* 936; see also *Egan's case*, 1 *Cox, C. C.* 29. The prisoner was indicted for forging the following "order for delivery of goods." "Sir, please to let the bearer, Capt. Geo. Williams, have 12 barrels of tar.—W. Robinson." It appeared that the prisoner was not the owner of, and had not any special interest in the goods in question, nor had he any authority to send such an order, if it had been genuine. Being convicted, the judges, on a case reserved, held that it was not an order within the act, on the authority of *Mitchell's case*, though most of them said, they should have doubted the propriety of that determination had it been *res integra*, but having been so long acquiesced in, they thought it should not now be departed from. *Williams's case*, 2 *East, P. C.* 937; 1 *Leach*, 114; *Elliot's case*, 2 *East, P. C.* 938. The prisoner was indicted for forging an order for the delivery of goods. The indictment stated, that J. L. Desormeaux, silk dyer, delivered to F. Purser, silk dyer, 78lbs. of raw silk, &c., and that the prisoner well knowing the premises, forged a certain warrant or order for the delivery of the goods, with the name of L. Desemockex thereto subscribed, purporting to have been signed by one Louis Desormeaux, by the name of L. Desemockex, he, the said L. Desormeaux, then and there being the servant of the

said J. L. D. in his business of a silk dyer, and purporting to be a warrant or order from the said L. Desormeaux, as such servant of the said J. L. D. for the delivery of, &c. the tenor of which, &c. is as follows :—

"Please to send by the bearer 8lb. of that wharpe hun market.
"L. Desemokex."

It appeared in evidence that the prisoner, who had lived for a fortnight with the prosecutor as servant, went to Purser, to whom certain silk had been delivered, with the forged order, which he represented as coming from Mr. L. Desormeaux, the son of the prosecutor, who managed part of his father's business. The prisoner being convicted, the judges on a reference to them, on the authority of *Mitchell's* and *Williams's case*, *ante*, p. 509, held the conviction wrong. They said that the order must be directed to the holder of, or person interested in, or having possession of the goods, but that the order in question was not directed to any person, merely expressing a desire that 8lbs. of silk should be delivered to the bearer, without any direction from whom it was to be received. On that ground, therefore, the judges were of opinion that this was not a warrant or order within the statute. They also said, that with regard to the form of the indictment, it ought to have appeared therein that the person whose name was subscribed to the order had authority to make it, which was not to be collected from the words of the present indictment. *Clinch's case*, 2 *East*, *P. C.* 938 ; 1 *Leach*, 540. It has been observed as a consequence of this decision, that if the indictment states the person, in whose name the order is forged, to have been a servant to J. S., and that the order was for the delivery of goods of J. S., it ought to show that the servant, as such, had a disposing power over the goods. *MS. Bayley, J.*, 2 *Russ. by Grea.* 520 (*n*). With respect to *Clinch's case*, Jervis, C. J., in *Snelling's case*, 1 *Dears. C. C. R.* 219, *ante*, p. 508, observed, "If that case be closely looked into, it will be found that the instrument must either be an order or be capable of being explained by evidence to be an order. The objection was, that it did not sufficiently appear by the indictment to be an order. The question was one of pleading, and not of evidence."

A conviction for uttering a forged order for the delivery of goods is bad if it appears that the person whose name is forged has no authority to order, and the writing merely purports to be a request. *R.* v. *Newton*, 2 *Moo. C. C.* 59.

The prisoner was indicted for disposing of and putting off a certain forged request, as follows :—

"Per Bearer,
"2 ½ Counterpain,
"T. Davies,
"88, Aldgate. E. Twell."

It was proved by Davies, whose name was forged, that they generally wrote their orders, "Send per bearer," or "Per bearer," and that such orders were common in their business. On its being objected that this did not purport to be a request within the 1 Wm. 4, c. 66, and that it was not addressed to any one, the judges were unanimously of opinion, that the words "per bearer" did not necessarily import "send per bearer," but might mean, "I have sent per bearer," and that there ought to have been an innuendo to explain them.

They seemed to think an address not necessary. *Cullen's case*, 1 *Moo. C. C.* 300.

The latter point again arose in a case which occurred soon afterwards. The prisoner was indicted for uttering a forged request for the delivery of goods, in the words and figures following:—

"Gentlemen,

"Be so good as to let bearer have 5½ yards of blue to pattern, &c., and you will oblige

"W. Reading, Mortimer St."

The request was not addressed to any one. The prisoner being convicted, the recorder respited the judgment, to take the opinion of the judges, on the question, whether, as the request was not addressed to any individual person by name or description, it was a request for the delivery of goods within the words and true intent of the statute. All the judges who were present at the meeting held the conviction right. *Carney's case*, 1 *Moo. C. C.* 351. The same point was decided in *R.* v. *Pulbrook*, 9 *C. & P.* 37, where the judges held that an instrument merely specifying the goods, may be shown to be a request by the custom of the trade; see also *R.* v. *Rogers*, 9 *C. & P.* 41; *R.* v. *Walters*, *Carr. & M.* 588; and *Snelling's case*, *ante*, p. 508.

An instrument may be a request, although it be also an undertaking to pay for the goods. *R.* v. *White*, 9 *C. & K.* 282.

In the following case a forged request was held to be within the act, although the party whose name was forged had not any authority over, or interest in the goods, neither did the request profess to charge such party, the goods being supplied on the credit of the prisoner: The latter represented to the prosecutor that M. C. was dead, and had left him 50*l.* or 60*l.*, and it was in the hands of A. D., and that he wanted mourning. The prosecutor refused to let the prisoner have the goods, but said he should have them if he would get an order for them from A. D. In about half an hour the prisoner returned with a forged paper, purporting to be signed by A. D., containing (*inter alia*) as follows: "Please to let W. T. have such things as he wants for the purpose. Sir, I have got the *mount* of 27*l.* for M. C. in my keeping these many years." The prisoner being convicted, it was held by the judges, that the conviction was right. *Thomas's case*, 7 *C. & P.* 851; 2 *Moo. C. C.* 16.

So a forged paper purporting to be addressed to a tradesman by one of his customers in the following form: "Pleas to let bearer, William Gof, have spillshoul and grafting tool for me," was held by Gurney, B., to be a forged request for the delivery of goods within the statute. *James's case*, 8 *C. & P.* 292. See also *R.* v. *White*, 9 *C. & P.* 282. A tasting order to taste wine in the London docks has been held to be an order for the delivery of goods within this section. *Illidge's case*, 1 *Den. C. C. R.* 404; *S. C.* 18 *L. J. M. C.* 179.

In a forged order for the delivery of goods, it does not appear to be necessary that the particular goods should be specified in the order, provided it be in terms intelligible to the parties themselves to whom the order is addressed. 2 *East, P. C.* 941. The prisoner was indicted for forging an order for the delivery of goods, as follows:—"Sir, Please to deliver my work to the bearer. Lydia Bell." Mrs. Bell, a silversmith, proved that she had sent several articles of plate to Goldsmiths'-hall to be marked. The form of the order was such as

is usually sent on such occasions, except that in strictness, and by the rule of the plate-office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it. The prisoner being convicted, the judges were of opinion that the conviction was right. *Jones's case*, 2 *East*, *P. C.* 941; 1 *Leach*, 53; and see *R.* v. *Thomas*, *supra*.

FORGING RECEIPTS.

By the 1 Wm. 4, c. 66, s. 10, "if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any acquittance or receipt, either for money or goods, or any accountable receipt, either for money or goods, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

The Irish statute against forgery of receipts is the 39 Geo. 3, c. 63, the punishment being altered by the 2 & 3 Wm. 4, c. 123, *ante*, p. 499.

With regard to what, on the face of it, will constitute a receipt, the following case was decided upon the repealed statute. The prisoner was convicted of uttering a forged *receipt for money*, as follows, *viz.*:—

"18th March, 1773.

"Received the contents above, by me

Stephen Withers."

The prisoner was employed by a lottery shopkeeper to carry out prize money, and had the following account delivered to him to carry out:—

"Mr. Withers.

"One-16th of a £20, price	£1	5	0
Deduct, &c.	0	1	0
	£1	4	0"

To this account the prisoner forged the receipt in question. It was objected for the prisoner, that the receipt being for "contents above," it and the bill were one entire thing, and the whole ought to have been set out; and that it did not appear by the indictment what the receipt was for. But the judges were of opinion that the indictment was good, for it was "Received the contents above," which showed it to be a receipt for something, though the particulars were not expressed, and it was laid to be a forged *receipt for money*, under the hand of S. W., for 1*l.* 4*s.* 0*d.*; and the bill itself was only evidence of the fact, and showed it to be a receipt for money as charged. *Testick's case*, 2 *East*, *P. C.* 925.

What is to be considered a "receipt for money," was decided in the following case: The prisoner was indicted under the 2 Geo. 2,

c. 25, and 31 Geo. 2, c. 22, s. 78, for forging a certain *receipt for money*, *viz.* &c.; and in other counts, upon the statute 7 Geo. 2, c. 22, with altering *a certain accountable receipt for bank notes for payment of money*, with intent to defraud the bank of England. It appeared that the prisoner was accountant to the London Assurance Company, who kept their cash with the bank of England, who furnished them with a book in which the clerk of the bank entered all sums paid in by the company, and signed his name to the entry. One of these entries was altered by the prisoner, from 210*l.* to 3,210*l.*, which was the forgery in question. It was objected for the prisoner, that the statutes 2 & 31 Geo. 2, mentioned only *money* and *goods*, and not *bank notes*; and the statute 7 Geo. 2, related only to *persons*, and not to *corporations*. The prisoner was acquitted upon the first count, and on a reference to the judges, with regard to the second objection, they were of opinion that the statute did not apply to corporations. *Harrison's case*, 2 *East*, *P. C.* 926; 1 *Leach*, 180. It appears from the report of this case in *Leach*, that the judges expressed a clear opinion that the entry in the bank-book was an *accountable receipt* within the meaning of the act, but no opinion to that effect was publicly given. See 2 *East*, *P. C.* 928.

In *West's case*, 1 *Den. C. C. R.* 258, the majority of the judges held, that an instrument professing to be a scrip certificate of a railway company, was not a receipt, nor an undertaking for the payment of money within the statute: "That it was not a receipt in ordinary parlance, nor made with the intent of being such, though it might be used as evidence of a payment of the deposit; but that any paper capable of being so used was not a receipt; as, for instance, a letter written by a landlord to a third person, saying that his tenant had duly paid his rent; that it was only an undertaking to deliver shares bearing interest, not that the interest should be paid; as an undertaking to deliver a bond for the payment of money with interest, would be no undertaking for the payment of money." See also *Clarke* v. *Newsam*, 1 *Exch. R.* 131: *S. C.* 16 *L. J. Ex.* 296.

It was the practice of the treasurer of a county, when an order had been made on him for the payment of expenses of a prosecution, to pay the whole amount to the attorney for the prosecution, or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively. Erle, J., held, that such a signature was not a receipt within this section, but merely an authority to the treasurer to pay the amount. *Cooper's case*, 2 *C. & K.* 586.

In an indictment for forging a receipt to an assignment for payment of a certain sum in a navy bill, it is not sufficient to state such navy bill and such assignment, and then to charge that the prisoner forged a receipt for money mentioned in the said navy bill as follows; *viz.* "Wm. Thornton, Wm. Hunter;" because the mere signing such names, unless connected with the previous matter, does not necessarily purport on the face of it to be a *receipt*; but it should be averred that such navy bill, &c., together with such signature, did purport to be, and was a receipt, &c. The judges, to whom the case was referred, said that the name itself, as stated in the indictment, was no receipt, though, coupled with the navy bill, it might form one. But then it ought to be so stated, as was done in the case referred to in the Crown Circuit Companion, which was an indictment for uttering a forged warrant for the payment of a South Sea annuity,

wherein it was stated that one D. H. was a clerk of the S. S. Company, intrusted to sign warrants for the payment of money, and that one H. P., having in his custody a certain warrant, &c., signed by the said D. H., and directed to R. R., the cashier of the company, for the payment of 8*l.* to one W. D., on the back of which said warrant the said W. D. had signed his name; *which said paper, partly printed, &c., together with the said indorsement, in form aforesaid, did purport to be, and was, a receipt, acquittance, and discharge under the hand of the said W. D. for the said sum of* 8*l.*; he the said H. P. did feloniously, &c., alter, &c. *Hunter's case*, 2 *East, P. C.* 928; 2 *Leach*. 624. Upon the authority of the foregoing case, the following was decided: The prisoner was indicted for forging "a certain receipt for money," as follows, that is to say, "Settled, S. M.," with intent, &c. It appeared in evidence, that the prisoner, who was employed to receive and pay the moneys of a subscription fund, had forged the receipt in question at the bottom of a bill sent in to the trustees of the fund. It was contended for the prisoner, that on the face of the indictment there did not purport to be "a receipt for money," and that it should have been shown to be such by proper averments; and the court (Thompson, B., and Graham, B.), on the authority of *Hunter's case, supra*, were of opinion, and held, that the indictment was defective. *Thompson's case*, 2 *Leach*, 910. The indictment charged that a precept had been issued by one C. H., high constable, &c., directed to the overseers of the poor of C. to collect 21*l.* 11*s.* 4*d.*; that a *receipt for money*, viz., for the sum of 21*l.* 11*s.* 4*d.* had been forged, by falsely affixing and cementing to the said precept, at the foot thereof, a certain receipt, in the handwriting of one Henry Hargreaves, of the tenor following; that is to say, "1825. Recd., H. H.," which had, before then, been made and written by the said Henry Hargreaves as a receipt for other money, and that the prisoner published, &c. It was objected that there ought to have been an averment to explain what was meant by the word "Recd.," and what by the initials H. H. The prisoner being convicted, the judges considered the case, and held the indictment bad, because there was nothing to show what the initials H. H. meant, or what connection Hargreaves had with Hindle, or with the receipt. *Barton's case*, 1 *Moody, C. C.* 141.

Thompson's case, supra, has been expressly overruled by *Martin's case*, 7 *C. & P.* 549, in which it was held by the judges, that the words "settled, 4*l.*, Samuel Hughes," at the foot of a bill of parcels, import a receipt and acquittance, and that an indictment for uttering the acquittance, which set out the bill of parcels with the word "settled," and the supposed signature at the foot of it, without any averment that the word "settled" imported a receipt or acquittance, was sufficient. A servant employed to pay bills received from her mistress a bill of a tradesman, called Sadler, together with money to pay that and other bills. She brought the bill again to her mistress, with the words, "Paid, sadler," upon it; Sadler being written with a small s, and there being no initial of the christian name of the tradesman. It was held by Lord Denman, C. J., that the words "Paid, sadler," under the circumstances, imported a receipt or acquittance for the money, and were not merely a memorandum by the servant of her having paid the bill. *Houseman's case*, 8 *C. & P.* 180. So where the prisoner was charged with forging and uttering a receipt, and the proof was that he had altered a figure in the following voucher, "11*l.* 5*s.* 10*d.*, for the high constable, T. H.;" and it was objected, on the authority

of *Barton's case*, *supra*, that the indictment was bad for not containing an averment what T. H. meant; Alderson, B., held it sufficient, and that the word "acquittance or receipt" was not necessary to constitute the instrument such, if it contained other words which sufficiently demonstrated that it was a receipt. *Boardman's case*, 2 *Lew. C. C.* 181; 2 *Moo. & R.* 147. So it was held by Gurney, B., that the words "recd. the above rate J. P.," sufficiently imported a receipt, without an innuendo to explain them. *Vaughan's case*, 8 *C. & P.* 276.

A scrip receipt, with the blank for the name of the subscriber not filled up, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a "receipt for money." Grose, J., in delivering the opinion of the judges in this case, observed, that the instrument, the tenor of which was necessarily set forth in the indictment, was not a receipt for money in contemplation of law, within the stat. 2 Geo. 2, c. 25. That it was the duty of the cashier, appointed by the bank, to receive such subscriptions; to fill up the receipt with the names of the subscribers; and until the blank was filled up, the instrument did not become an acknowledgment of payment, or, in other words, a *receipt for money;* while, in such a state, it was no more a receipt than if the sum professed to be received were omitted. That in *Harrison's case* (*ante*, p. 513), the book in which the entry was made, imported to be a book containing receipts for money received by the bank from their customers, and showed that the money was received from the person to whom the book belonged. *Lyon's case*, 2 *East*, *P. C.* 933; 2 *Leach*, 597.

In the following case, a point arose with regard to the party intended to be defrauded by certain forged receipts. Grose, J., in delivering the opinion of the judges, stated the facts of the case. He said the prisoner was tried on an indictment charging him, in the first count, with having uttered twenty-two forged acquittances and receipts for money, purporting to be signed by different persons, as for money received by John Collinridge. There were two other counts, one for forging, and another for uttering one of the receipts. Previously to the trial, it was submitted to the court by the prisoner's counsel, that the prosecutor ought to be directed on which particular receipt he intended to proceed; but the indictment charging him with having uttered all the receipts at one and the same time, the objection was overruled, and the judges were of opinion that this application was properly refused; for it was proved that the prisoner had uttered all the receipts, at the same time, to the solicitor of the navy board, as vouchers for the account of Collinridge, a public accountant, deceased, which the prisoner had undertaken to get passed at the navy board. The second objection was, that as these receipts purported to be receipts given to Collinridge, by the workmen whom he employed, for work done and materials found for *him*, the navy board had no concern with them, and the offence was not within the 2 Geo. 2, c. 25, s. 1, or 31 Geo. 2, c. 22; for that the workmen were solely employed by Collinridge, and not by the navy board; and that, as he only was answerable, it was indifferent to the board whether the sums had been paid or not. In answer to this objection, the learned judge observed, that as the work was done for the commissioners of the navy board, the persons employed for that purpose by *him*, were employed not solely on his own account, but also on account of the king; and these receipts, if genuine, would have been legal vouchers, for his account, and

would have entitled him to a discharge from the navy board. The judges, therefore, were of opinion, that the instruments were forged receipts for money within the statute, and that they had been uttered with intent to defraud the king. *Thomas's case*, 2 *Leach*, 877; 2 *East*, *P. C.* 934.

To constitute a receipt for money, within the statute, the instrument must purport to be an acknowledgment by some one, of money having been received. The prisoner was indicted for forging a receipt and acquittance (setting it out). The instrument was as follows:

> "William Chinnery, Esq. paid to X *tomson* the som of 8 pounds. feb. 13, 1812."

It was not subscribed, but was uttered by the prisoner as a genuine receipt, and taken as such by Mr. Chinnery's housekeeper. The prisoner being convicted, the judges held the conviction wrong, being of opinion that this could not be considered as a receipt. It was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof. *Harvey's case*, *Russ. & Ry.* 227.

Where on an indictment for uttering a forged receipt for the sum of 10*l.*, it appeared that the prisoner pretended that he was authorised by James Ruse to settle the debt and costs in an action brought by Ruse against Pritchard, and thereby obtained from Pritchard the sum of 10*l.*, for which he produced the following receipt, which was stamped with a 2*s.* 6*d.* stamp:

> "Received of Mr. Wm. Pritchard by the hands of Mr. Wm. Griffiths the sum of 10*l.*, being in full for debt and costs due to the said Jas. Ruse, having no further claim against the said Wm. Pritchard. As witness my hand, this 15th day of October, 1842.
>
> "The mark of ⋈ James Ruse."

And it was clearly proved that Ruse had not signed the receipt or authorised it to be signed, or empowered the prisoner to settle the debt and costs. It was objected that the receipt was not properly stamped; that the instrument was not a receipt, but an agreement; and that the statute only applied to cases where a debt was actually due. But Wightman, J., overruled the objection, and the prisoner was convicted. *Griffith's case*, 2 *Russ. by Grea.* 997, *Addenda*.

But the document need not be signed. In *R.* v. *Juda*, 2 *C. & K.* 635, an unsigned forged paper, "Received from Mr. Bendon, due to Mr. Warman, 17*s.*—Settled," was held to be a forged receipt within this section.

As to what amounts to the uttering of a receipt, see *R.* v *Radford*, 1 *C. & K.* 707; 1 *Denison, C. C.* 59, *ante*, p. 490.

FORGERIES RELATING TO THE PUBLIC FUNDS.

False entries in books of bank, and transfer in false names.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 5, "if any person shall wilfully make any false entry in, or wilfully alter any word or figure in any of the books of account, kept by the governor and company of the bank of England, or by the governor or company of mer-

chants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fisheries, commonly called the South Sea Company; in which books, the accounts of the owners of any stock, annuities, or other public funds, which now are or hereafter may be transferable at the bank of England, or at the South Sea House, shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of, or in any stock, annuity, or other public fund, which now is, or hereafter may be transferable at the bank of England, or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony; and being convicted thereof, shall suffer death as a felon." As to present punishment *vide ante*, p. 499.

Proof of forging transfers of stock, and of power of attorney to transfer.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 6, "if any person shall forge or alter, or shall utter knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is, or hereafter may be transferable at the bank of England, or at the South Sea House, or of, or in the capital stock of any body corporate, company, or society which now is, or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of, or in any such stock, annuity, public fund, or capital stock as is herein-before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest tranferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney, or other authority knowing the same to be forged or altered, with intent in any of the several cases aforesaid, to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest, or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner as if such person were the true and lawful owner; every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." As to the present punishment see *ante*, p. 499.

In the following case which was an indictment founded on the former stat. 33 Geo. 3, c. 30, several points were ruled with regard to indictments for forging a transfer of stock. Three objections were taken on behalf of the prisoner: 1st, that there did not appear in evidence to be any acceptance of the transfer by the party who was alleged to be possessed of the stock, till which time it was said the transfer was incomplete; 2ndly, that till the stock was accepted, no transfer at all could be made; 3rdly, that the instrument was not witnessed, which, according to the printed forms used by the bank, should have been done. The prisoner having been convicted, the opinion of the judges on the case was delivered by Buller, J. He observed, that as to the two first objections, two answers had been given: 1st, that the stock vested by the mere act of transferring it into the name of the party, and that if he had died before he accepted it, it

would have gone to his executors as part of his personal estate; 2ndly, that the nature of the offence would not have been altered if the party had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete, if the party had really had no stock. As to the third objection, the judges all thought that the entry and signatures, as stated in the indictment, were a complete transfer, without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection. *Gade's case*, 2 *East*, *P. C.* 874; 2 *Leach*, 732.

Proof of personating owner, and endeavouring to transfer stock.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 7, "if any person shall falsely and deceitfully personate any owner of any share or interest of, or in any stock, annuity, or other public fund which now is, or hereafter may be transferable at the bank of England, or at the South Sea House, or any owner of any share or interest of, or in the capital stock of any body corporate, company, or society which now is, or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, every such offender shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

The following case was decided upon the former statute, 31 Geo. 3, c. 22: The prisoner was indicted for personating one Isaac Hart, the proprietor of certain stock, and thereby endeavouring to receive from the bank of England, the sum of, &c. It appeared that the prisoner, representing himself to be Isaac Hart, received from the dividend-payer, at the bank, a dividend warrant for the sum due, on receiving which, instead of carrying it to the pay-office, he walked another way, and made no attempt to receive the money. It was objected for the prisoner, that there was no proof of his having endeavoured to receive the money, but being convicted, the judges held the conviction right. They said, that the manner in which he applied for and received the warrant was a personating of the true proprietor, and that he thereby endeavoured to receive the money, within the intent and meaning of the act of parliament. *Parr's case*, 1 *Leach* 434; 2 *East*, *P. C.* 1005.

Proof of forging attestation to power of attorney, or transfer of stock.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 8, "if any person shall forge the name or handwriting of any person, as or purporting to be a witness attesting the execution of any power of attorney or other authority, to transfer any share or interest of, or in any such stock, annuity, public fund, or capital stock, as is in the said act before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other such authority, with the name or handwriting of any person forged thereon, as an attesting witness, knowing the same

to be forged, every such offender shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year."

Proof of clerks in the bank making out false dividend warrants.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 9, "if any clerk, officer, or servant of, or other person employed or entrusted by the governor and company of the bank of England, or the governor and company of merchants, commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is, or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year."

The Irish statute which relates to the bank of Ireland, and provides against offences similar to those mentioned in the above sections, is the 37 Geo. 3, c. 51, the punishment being altered by the 2 & 3 Wm. 4, c. 123, s. 1, *ante*, p. 499.

Proof of forging exchequer bills—East India bonds, &c.] The forging or counterfeiting of any exchequer bill is made a felony by the several acts passed usually every year, authorising the issue of such security. Latterly it has been enacted by these annual acts, the last of which is the 8 Vict. c. 23 (U. K.), that the clauses of the 48 Geo. 3, c. 1 (G. B.), entitled "An act for regulating the issuing of, and paying off of Exchequer Bills," shall be applied and extended to the exchequer bills to be made in pursuance of such annual acts. By the 9th sect of the 48 Geo. 3, c. 1, "if any person or persons shall forge or counterfeit, an exchequer bill or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill, with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon or therein, exchanged for ready money or for another exchequer bill by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his Majesty, his heirs, and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon [and shall suffer as in cases of felony without benefit of clergy];" but for the present punishment, see *ante*, p. 499.

Pursuant to ss. 9 and 10 of the 5 & 6 Vict. c. 66 (U. K.), (which statute is extended to the 9 Vict. c. 23 (U. K.), by the 2nd sect. of the latter act), persons manufacturing or using paper, plates, or dies

intended to imitate those intended for exchequer bills, are guilty of felony, and persons unlawfully having in possession paper to be used as exchequer bills, are guilty of a misdemeanor.

The 11 Geo. 4 & 1 Wm. 4, c. 66, s. 3, enacts (*inter alia*), that "if any person shall forge or alter, or shall offer, utter, dispose of, or put off knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or any indorsement on, or assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of England, trading to the East Indies, commonly called an East India bond, with intent in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony; and being convicted thereof, shall suffer death as a felon." For the present punishment, see *ante*, p. 499.

FORGERY, AND SIMILAR OFFENCES WITH REGARD TO BANK OF ENGLAND AND BANKERS' NOTES.

The various statutes passed for the purpose of preventing the forgery of bank notes are repealed, and their provisions re-enacted by the 11 Geo. 4 & 1 Wm. 4, c. 66, which contains the following clauses relating to this head of forgery:

Proof of forging and uttering bank notes.] By sec. 3, of the above statute, it is enacted (*inter alia*), that "if any person shall forge or alter, or shall offer, utter, dispose of, or put off knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on, or assignment of any bank note or bill of exchange, or bank post bill, with intent in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Proof of knowingly purchasing or receiving, or having in possession forged bank notes.] By sec. 12, "if any person shall, without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank note bill, blank bill of exchange, or blank post bill knowing the same respectively to be forged, every such offender shall be guilty of felony; and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Proof of making or having, without authority, any mould for making paper with the words "Bank of England" visible in the substance, or for making paper with curved bar lines, &c., or selling such paper.] And by sec. 13, "if any person shall, without the authority of the governor and company of the bank of England, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words 'Bank of England' visible in the substance

of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper whatsoever with the words 'Bank of England' visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall by any art or connivance cause the words 'Bank of England' to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed; every such offender shall be guilty of felony; and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Proviso as to paper used for bills of exchange, &c.] And by sec. 14, it is provided and enacted, that "nothing therein contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines, or the watermarks of the paper used by the governor and company of the bank of England."

Proof of engraving on any plate, &c. any bank note, blank bank note, &c., or using or having such plate, &c., or uttering or having paper upon which a blank bank note, &c. shall be printed, without authority.] And by s. 15, "if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or blank bill of exchange, or part of a promissory note or bill of exchange purporting to be a bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the bank of England, to be proved by the party accused; or if any person shall use such plate, wood, stone, or other material, or any other instrument or device, for the making or printing of any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person

shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange or bank post bill, shall be made or printed; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper; every such offender shall be guilty of felony; and being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Sewing to the parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. *Harris's case*, 7 *C. & P.* 429.

Proof of engraving on any plate, &c. any word, number, or ornament resembling any part of a bank note, &c.] And by s. 16, "if any person shall engrave, or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the bank of England, to be proved by the party accused; or if any person shall use any such plate, wood, stone, or other material, or any other instrument or device for the making upon any paper or other material the impression of any word, number, figure, character, or ornament, which shall resemble, or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid; every such offender shall be guilty of felony; and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Proof of making or having in possession any mould for manufacturing paper, with the name of any bankers appearing in the substance.] And by s. 17, "if any person shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the bank of England) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame,

mould, or instrument; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers shall appear visible; or if any person shall, without such authority, to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers, to appear visible in the substance of the paper upon which the same shall be written or printed; every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year."

Proof of engraving on any plate, &c. any bill of exchange or promissory note of any bankers, &c.] And by s. 18, "if any person shall engrave or in any wise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the bank of England), without the authority of such person or persons, body corporate or company, the proof of which authority shall lie on the party accused; or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate or company carrying on the business of bankers, without such authority, to be proved as aforesaid; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling or apparently intended to resemble such subscription, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble any such subscription, shall be made or printed, every such offender shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year."

The above section applies to persons having feloniously in their possession the plates of promissory notes of bankers in Upper Canada. *Hannon's case*, 9 *C. & P.* 11; 2 *Moo. C. C.* 77.

In *Keith's case*, 1 *Dears. C. C. R.* 486; *S. C.* 24 *L. J. M. C.* 110, the prisoner was convicted under this section for engraving upon a

plate part of a promissory note of a banking company. Being possessed of a promissory note of the British Linen banking company, he had cut the centre of the note on which the whole of the promissory note was written, and had procured to be engraved upon a plate part of the ornamental border of the note, consisting of the royal arms. The question reserved for the consideration of the Court of Criminal Appeal was, whether this amounted to an engraving upon a plate, "part of a bill of exchange or promissory note, purporting to be part of the bill or note," within the meaning of this section. The court held that it did. Parke, B., in his judgment said, "To see whether an engraving purports to be part of a note you must compare it with the original note. If the forged engraving is clearly intended to imitate any part of a note, whether that part be the obligatory part of the note or not, it is, I think, an offence within the statute. There must be such a portion engraved, that you can say clearly on comparison that it is intended to imitate part, or to purport to be part of a note. If a single dot or line only were engraved, there would not be enough to induce one to say, that the engraving purported to be part of a note. But in the present case the royal arms of Scotland in the position in which they are found, and the Britannia in the margin, appear on comparison without any doubt to purport to be part of the ornaments of a real note."

Forgeries relating to the bank of Ireland are provided against by the 30 Geo. 3, c. 53, and forgeries in Ireland on the bank of England, by the 39 Geo. 3, c. 63; the punishment enacted in those statutes is altered by the 2 & 3 Wm. 4, c. 123, s. 1, *ante*, p. 499. Purchasing or receiving forged notes, &c. of the bank of Ireland is made felony, punishable with fourteen years transportation, by the 49 Geo. 3, c. 53.

Proof of engraving foreign bills or notes, &c.] By the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 19, "if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be, or be intended to be under seal purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of his Majesty, without the authority of such foreign prince or state, minister or officer, body corporate, or body of the like nature, person, or company of persons, the proof of which authority shall lie on the party accused; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any plate, stone, wood, or other material, upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or if any person, shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such foreign bill,

note, undertaking, or order shall be made or printed; every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, nor less than one year."

Where foreign notes were set out in an indictment in the original language, but the translation omitted some words which were in a margin or border round the note, and denoted the year in which the notes were issued, and it appeared that without these words the notes would not be capable of being circulated in the country to which they belonged, the judges held, that the translation was imperfect, and the counts setting out the notes consequently bad. They also held, that describing a foreign note wholly in the English language is not sufficient in an indictment for forgery, notwithstanding the 2 & 3 Wm. 4, c. 123, s. 3, *ante*, p. 494; but that the objection, provided the description is in the words of the statute creating the offence, can only be taken advantage of by demurrer, and is cured after verdict by the 7 Geo. 4, c. 64, s. 21. *Harris's case*, 7 *C. & P.* 1 *Moo. C. C.* 466, *S. C.*

Forgery of seals, stamps, or signatures, and false printing of private acts or journals of parliament admissible in evidence under the 8 *&* 9 *Vict. c.* 113.] By 8 & 9 Vict. c. 113, s. 4, "if any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or of any certified copy of any document, by-law, entry in any register or other book or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of, or relating to any corporation or company already established, or to any corporation or company to be hereafter established; or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence any order, decree, certificate or other judicial or official document, with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit; or if any person shall print any copy of any private act of, or of the journals of either house of parliament, which copy shall falsely purport to have been printed by the printers to the crown, or by the printers to either house of parliament, or by any or either of them; or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years, or to imprisonment for any term not more than three, nor less than one year, with hard labour."

FORGING ENTRIES IN PUBLIC REGISTERS, ETC.

The forging of entries in registers of marriages, &c., was formerly provided against by the statutes 52 Geo. 3, c. 146, and 4 Geo. 4, c. 76; but the provisions of those statutes on this subject are now repealed and re-enacted in substance in the 11 Geo. 4 & 1 Wm. 4, c. 66.

By s. 20, "if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which has been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter in any such register, any entry of any matter relating to any baptism, marriage, or burial; or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage or burial, knowing such writing to be false, forged, or altered; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered; or shall utter any copy of such entry, knowing such entry to be false, forged, or altered; or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register or any part thereof; or shall forge or alter, or shall utter knowing the same to be forged or altered, any licence of marriage; every such offender shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

Under this section, Alderson, B., held, that if A. give to B. a forged certificate of an intended marriage between himself and B. in order that B. may give it to a third party, A. is not guilty of an uttering. *Heywood's case*, 2 *C. & K.* 352.

As to what is a destroying, &c. of a register under this section, see *Bowen's case*, 1 *Den. C. C. R.* 22.

And by s. 21, it is provided and enacted, "that no rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial respectively by him solemnized, shall be liable to any of the penalties herein mentioned, if he shall, within one calender month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose pre-

sence the same are directed to be made as aforesaid: provided, also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid."

And by s. 22, reciting, that whereas copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declaration of the rector, vicar, curate, or officiating minister of every parish, district parish, and chapelry in England, where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which such parish, district parish, or chapelry may be situated; it is enacted, "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall utter knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year."

By the 6 & 7 Wm. 4, c. 86, for registering births, deaths, and marriages in England (s. 43), "every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such register-book, or any part or certified copy of any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited any part of any such register-book, or certified copy thereof, or shall wilfully insert, or cause to be inserted in any register-book or certified copy thereof, any false entry of any birth, death, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register-book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register-office, shall be guilty of felony."

The forgery of non-parochial registers deposited under the 3 & 4 Vict. c. 92, is made felony by the 8th section of that statute; the punishment for which offence, pursuant to the 7 & 8 Geo. 4, c. 28, ss. 8, 9, and the 1 Vict. c. 90. s. 5, is transportation for seven years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

Forgery and falsification relating to marriage registers in Ireland are provided against by the 7 & 8 Vict. c. 81, s. 75.

FORGERY OF STAMPS.

By 52 Geo. 3, c. 143, s. 7, "if any person shall, after the passing of this act, forge or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, die, or plate which, in pursuance of any act or acts of parliament, shall have been provided, made, or used by or under the direction of the commissioners appointed to manage the duties on stamped vellum, parchment, and paper, or by or under the direction of any other person or persons legally autho-

rised on that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said commissioners for the ace of spades, to be used with any playing cards, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, the impression, or any resemblance of the impression of any such mark, stamp, die, or plate as aforesaid, upon any vellum, parchment, paper, card, ivory, gold, or silver plate, or other material, or shall stamp or mark, or cause or procure to be stamped or marked any vellum, parchment, paper, card, ivory, gold, or silver plate, or other material, with any such forged or counterfeited mark, stamp, die, or plate as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties, or any part of the duties under the care and management of the said commissioners; or if any person shall utter or sell, or expose to sale any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, having thereupon the impression, or any such forged or counterfeited mark, stamp, die, or plate, or any such forged or counterfeited impression as aforesaid, knowing the same respectively to be forged or counterfeited; or if any person shall privately or secretly use any such mark, stamp, die, or plate, which shall have been so provided, made, or used by, or under such direction as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties, or any part of the duties under the care and management of the said commissioners, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy." As to the present punishment, see *ante*, p. 499.

And by 55 Geo. 3, c. 184, s. 7, "if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited any stamp, or die, or any part of any stamp or die which shall have been provided, made, or used, in pursuance of this act, or in pursuance of any former act or acts relating to any stamp duty or duties, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled the impression, or any part of the impression of any such stamp or die, as aforesaid, upon any vellum, parchment, or paper, or shall stamp or mark, or cause or procure to be stamped or marked any vellum, parchment, or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties hereby granted, or any part thereof; or if any person shall utter, or sell or expose to sale any vellum, parchment, or paper having thereon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited, or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any stamp or die which shall have been so provided, made or used as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the said duties, or any part thereof; or if any person shall fraudulently cut, tear, or get off, or cause, or procure to be cut, torn or got off the impression of any stamp or die which shall have been provided, made, or used, in pursuance of that or any former act, for expressing or denoting any duty or duties, under the care and management of the commissioners

of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper or any instrument or writing charged or chargeable with any of the duties thereby granted; then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy." As to the present punishment, see *ante*, p. 499.

By the 3 & 4 Wm. 4, c. 97, s. 11, "whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to vend or deal in stamps, or who shall have been so licensed at any time within six calendar months then next preceding, such vellum, parchment, or paper having thereon any false, forged, or counterfeit stamp, mark, or impression resembling or representing, or intended or liable to pass or be mistaken for any stamp, mark, or impression of any die, plate, or other instrument, which at any time whatever hath been, or shall or may be provided, made, or used by or under the direction of the commissioners of stamps, for the purpose of expressing or denoting any stamp duty whatever, then, and in every such case, the person in whose possession such vellum, parchment, or paper shall be so found, shall be deemed and taken to have so had the same in his possession, with intent to vend, use, or utter the same, with such false, forged, or counterfeit stamp, mark, or impression thereon, unless the contrary shall be satisfactorily proved; and such person shall also be deemed and taken to have such vellum, parchment, or paper so in his possession knowing the stamp, mark, or impression thereon to be false, forged, and counterfeit, and such person shall be liable to all penalties and punishments by law imposed or inflicted upon persons vending, using, uttering, or having in possession false, forged, or counterfeit stamps knowing the same to be false, forged, or counterfeit, unless such person shall, in every such case, satisfactorily prove that such stamp or stamps was or were procured by or for such person, from some distributor of stamps appointed by the said commissioners, or from some person licensed to deal in stamps, under the authority of this act."

By s. 12, "If any person shall, knowingly and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or instrument resembling or intended to resemble, either wholly or in part, any die, plate, or other instrument which at any time whatever hath been, or shall or may be provided, made, or used by or under the direction of the commissioners of stamps, for the purpose of expressing or denoting any stamp duty whatever; or, if any person whatever shall, knowingly and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any vellum, parchment, or paper having thereon the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp, mark, or impression resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been, or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit

stamp, mark, or impression to be false, forged, or counterfeit, or if any person shall fraudulently use, join, fix, or place for, with, or upon any vellum, parchment, or paper any stamp, mark, or impression, which shall have been cut, torn, or gotten off, or removed from any other vellum, parchment, or paper; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from any stamped vellum, parchment, or paper, any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such vellum, parchment, or paper, or that the same may be used for any deed, instrument, matter, or thing, in respect whereof any stamp duty is, or shall or may be, or become payable; or if any person shall knowingly use, utter, sell, or expose to sale, or shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any stamped vellum, parchment, or paper from or off, or out of which any such name, sum, date, or other matter or thing as aforesaid, shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid; then, and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony; and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

Proof of the intent.] It was held, on an indictment under the 13 Geo. 3, c. 52, s. 14, and the 38 Geo. 3, c. 69, s. 7, for unlawfully transposing the mark of the Goldsmiths' Company from one gold ring to another, that it did not require any fraudulent intent to be proved, in order to bring the party within the statutes, there being no words in the statutes to that effect. *Ogden's case*, 6 *C. & P.* 631.

Variance.] Upon an indictment for removing from one silver knee-buckle to another, certain stamps, marks, and impressions; to wit, the King's head, and the lion rampant, on producing the knee-buckle in evidence, it appeared that the lion was a lion passant, and not a lion rampant; and this was held to be a fatal variance. *Lee's case*, 1 *Leach*, 416.

For forging the stamp denoting the duty to have been paid on paper, pasteboard, &c., see the 1 Geo. 4, c. 48, s. 13; forging the stamp on linens, calicoes, stuffs, &c., the 10 Anne, c. 19, s. 97; 13 Geo. 3, c. 56, s. 5; forging the stamp on cambrics, 4 Geo. 3, c. 87.

The act relating to forgeries on the Stamp Office in Ireland is the 56 Geo. 3, c. 56, which statute is repealed by the 6 & 7 Wm. 4, c. 76, s. 32; "as relates to newspapers or the duties thereon, or to any discount or allowance in respect of the said duties." The 5 & 6 Vict. c. 82, contains new regulations as to the stamp duties in Ireland. See also as to forging stamps, &c., on pasteboard, the Irish act, 56 Geo. 3, c. 73.

For forgeries relating to the stamps on gold and silver wares in England, see the 7 & 8 Vict. c. 22, s. 2.

FORGERY OF OTHER PUBLIC DOCUMENTS.

There are a great variety of statutes containing enactments against the forging of public documents of various kinds. A reference to the principal of these is all that can be given in the present work.

Forgeries relating to the navy and army.] 11 Geo. 4 & 1 Wm. 4, c. 20 (U. K.), for amending and consolidating the laws relating to the pay of the royal navy. 2 Wm. 4, c. 40, forgeries relating to the civil business of the navy. 5 & 6 Wm. 4, c. 24, s. 3, forgeries relating to service in the navy. See also 57 Geo. 3, c. 127; 10 Geo. 3, c. 26 (U. K.); 23 Geo. 3, c. 50, forging name of paymaster of the forces. 47 Geo. 3, sess. 2, c. 25, s. 8, forging names of persons entitled to pay or pensions. 2 & 3 Wm. 4, c. 106, forging certificates of half-pay. 54 Geo. 3, c. 86, s. 8, altering names in prize-lists. 7 Geo. 4, c. 16, false certificate or representation as to Chelsea Hospital; s. 38, false personation of officers and soldiers entitled to pay; forging their names, &c. 2 Wm. 4, c. 83, s. 49, forgeries relating to officers entitled to prize-money, or to the officers of Chelsea Hospital. See *Reg.* v. *Pringle*, 2 *M. C. C.* 127; 9 *C. & P.* 408. 46 Geo. 3, c. 45, s. 9, forging name of treasurer of the ordnance. 54 Geo. 3, c. 151, forging name of agent-general of volunteers. 2 & 3 Vict. c. 51, forging documents relating to pensions granted for service in the army, navy, royal marines and ordnance. 14 & 15 Vict. c. 99, forging the seal, stamp, or signature of documents made evidence by that act.

Forgeries relating to the customs and excise.] Forging the name of the receiver or comptroller-general of the customs, is punishable with transportation for life, by 3 & 4 Wm. 4, c. 51, s. 27 (in Ireland the 6 Geo. 4, c. 106); and by the 8 & 9 Vict. c. 85, s. 26 (U. K.). Unauthorised persons making paper in imitation of excise paper, and persons forging or counterfeiting plates or types, are guilty of felony, and subject to transportation, by 2 Wm. 4, c. 16 (U. K.), s. 3; and by section 4, persons counterfeiting permits, or uttering forged permits, are likewise guilty of felony, and punishable in the same manner. By the 7 & 8 Geo. 4, c. 53 (U. K.), the forging of the name of the receiver-general or comptroller of excise, is made a capital felony; but the capital punishment is taken away by 1 Wm. 4, c. 76, s. 10. As to forging debentures and certificates, see 52 Geo. 3, c. 143, s. 10. For these two offences in Ireland, see the 23 & 24 Geo. 3, c. 22.

Forgeries relating to land tax, &c.] The forgery of contracts for the redemption of the land tax, is provided against by the 52 Geo. 3, c. 143. So the forging of the names of the commissioners of woods and forests, by the 10 Geo. 4, c. 50, s. 124.

Forgeries relating to public officers in courts of justice, &c.] Forging the name of the accountant-general of the court of Chancery,

12 Geo. 1, c. 32; or of the accountant-general of the court of Exchequer, 1 Geo. 4, c. 35; or of the receiver at the Alienation Office, 52 Geo. 3, c. 143; or of the registrar of the court of Admiralty, 53 Geo. 3, c. 151, s. 12; or of certificate of former conviction, 7 & 8 Geo. 4, c. 28, s. 11; or the seal of the register office, 6 & 7 Wm. 4, c. 86, s. 43, *ante*, p. 527.

Forgeries relating to matters of trade, &c.] Forging declarations of return of insurance, is punishable with transportation for seven years, under the 54 Geo. 3, c. 133, s. 10. Forgeries of documents relating to the suppression of the slave trade, are provided against by the 5 Geo. 4, c. 113, s. 10; forgeries of Mediterranean passes, by the 4 Geo. 2, c. 18, s. 1 (in Ireland, the 27 Geo. 3, c. 27); and forgeries of certificates of quarantine, by the 6 Geo. 4, c. 78 (U. K.), s. 25.

Forgeries relating to stage and hackney carriages, are provided against by the 2 & 3 Wm. 4, c. 120; and the 1 & 2 Vict. c. 79, s. 12.

Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required by the commissioners for the reduction of the national debt, &c., is provided against by the 2 & 3 Wm. 4, c. 59, s. 19. Forging any certificate of a receipt given to or by the commissioners for relief to the West India Islands, by the 2 & 3 Wm. 4, c. 125, s. 64; to or by the commissioners for relief to the Island of Dominica, by the 5 & 6 Wm. 4, c. 51, s. 5; forging any receipts for compensation money to slave-owners, by the 5 & 6 Wm. 4, c. 45, s. 12.

Frauds or false mutilations, or erasures in their books of account or register, or in their other documents by directors or officers of joint stock companies, are made misdemeanors by the 7 & 8 Vict. c. 110, s. 31.

With regard to other forgeries in Ireland, see the 48 Geo. 3, c. 82, s. 4, as to granting, obtaining, or using false permits in Ireland; 1 & 2 Wm. 4, c. 33, forgeries relative to public works in Ireland; 2 & 3 Wm. 4, c. 88, s. 40, forgeries in respect to the registry of freeholders in Ireland.

Forgeries relating to records, &c.] Avoiding records: felony, 8 Hen. 6, c. 12. Forging a memorial or certificate of registry of lands in Yorkshire or Middlesex, imprisonment for life, forfeiture of lands, &c., 2 & 3 Anne, c. 4, s. 19; 5 & 6 Anne, c. 18, s. 8; 7 Anne, c. 20, s. 15; 8 Geo. 2, c. 6, s. 21. Forging the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or of any certified copy of any document, by-law, entry in any register or other book or other proceeding receivable in evidence; or tendering in evidence any such certificate, &c., with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit; or forging the signature of any judge [of any of the superior courts of equity or common law] to any order, decree, certificate, or other judicial or official document; or tendering in evidence any order, &c., with a false or counterfeit signature of any such judge thereto, knowing the same to be false or counterfeit; or printing any copy of any private act, or of the journals of either house of parliament; or tendering in evidence any such copy, knowing the same was not printed by the person by whom it purports

to have been printed; felony, transportation for seven years, or imprisonment for not more than three years, nor less than one year, with hard labour, 8 & 9 Vict. c. 113, s. 4. Certifying as true any false copy of, or extract from any of the records in the public record office; felony, transportation for life, or not less than seven years, or imprisonment not exceeding four years, 1 Vict. c. 94, ss. 19, 20. Uttering a false certificate of a previous conviction; felony, transportation, or imprisonment and whipping, 7 & 8 Geo. 4, c. 28, s. 11.

FURIOUS DRIVING.

THIS, considering the probable danger to the lives of the public, would seem to be an indictable offence at common law; *Williams* v. *E. I. Company*, 3 *East*, 192; and now by the 1 Geo. 4, c. 4 (E.), if any person whatever shall be maimed, or otherwise injured by reason of the wanton or furious driving or racing, or by the wilful misconduct of any coachman, or other person having the charge of any stage-coach or public carriage, such wanton or furious driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is therefore declared to be a misdemeanor, and punishable as such, by fine and imprisonment: provided that nothing in that act contained shall extend, or be construed to extend to hackney-coaches being drawn by two horses only, and not plying for hire as stage-coaches.

GAME.

All offences with regard to game, which are the subject of indictment, are statutable offences, not known to the common law. Such animals being *feræ naturæ*, are not, in their live state, the subjects of larceny. *Vide post, title Larceny.*

The principal provisions with regard to offences relating to game, are contained in the 7 & 8 Geo. 4, c. 29; the 9 Geo. 4, c. 69; and the 7 & 8 Vict. c. 29—(the 27 Geo. 3, c. 35; and the 7 Geo. 4, c. 9, 1,)

TAKING OR KILLING HARES, ETC., IN THE NIGHT, IN GROUND USED FOR BREEDING, ETC.

By the 7 & 8 Geo. 4, c. 29, s. 30, if any person shall unlawfully and wilfully, in the night-time, take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or coneys, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and shall be punished accordingly.

The offence, in the day-time, is made the subject of summary conviction.

Upon an indictment under the statute, the prosecutor must prove: 1st, the taking or killing of a hare or coney; 2nd, that it was in some warren or ground lawfully used for the breeding, &c.; and 3rd, that the offence was committed in the night.

Proof of the taking or killing.] It is not necessary to give evidence that the defendant was seen in the act of taking or killing the hare, nor in order to prove a *taking*, is it necessary to show that the animal came actually into his hands. Thus where the defendant had set wires, in one of which a rabbit was caught, and the defendant, as he was about to seize it, was stopped by the keeper; this was held by the judges to be a *taking* within the stat. 5 Geo. 3, c. 14, the word *taking* meaning *catching*, and not taking away. *Glover's case, Russ. & Ry.* 269.

Proof that the offence was committed in some warren or ground lawfully used for the breeding of hares, &c.] This averment must be proved as laid in the indictment. It must also be shown, that the place was situated in the parish mentioned in the indictment, and that it was in the occupation of the party stated. The act, moreover, applies to places which are either warrens, or which are similar to warrens, where rabbits are generally kept, and not to places where a few rabbits may be kept. *R.* v. *Garratt*, 6 *C. & P.* 369.

Proof of the offence being committed in the night-time.] The 7 & 8 Geo. 4, c. 29, does not contain, like the 9 Geo. 4, c. 69, any clause declaring what shall be deemed night-time. The word, therefore, must be taken to have the same sense as it had by the common law in burglary. *Vide, ante*, p. 350.

TAKING OR DESTROYING GAME BY NIGHT.

By the 9 Geo. 4, c. 69, s. 1 (repealing 57 Geo. 3, c. 90), it is enacted, that "if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits, in any land, whether open or inclosed, or shall, by night, unlawfully enter, or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game (which word, by s. 13, shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards), such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period, shall find sureties by recognizance, or in Scotland, by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall thereof be convicted before two justices of the peace, he shall be committed to the common gaol or house of correction, for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period, shall find sureties by recognizance or bond as aforesaid, himself in 20*l.* and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years next following, and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found;

and in case such person shall so offend a third time, he shall be guilty of a misdemeanor; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case."

The 7 & 8 Vict. c. 29, s. 1, enacts, that "from and after the passing of this act (the 4th July, 1844), all the pains, punishments, and forfeitures imposed by the 9 Geo. 4, c. 69, upon persons, by night, unlawfully taking or destroying any game or rabbits, in any land open or inclosed, as therein set forth, shall be applicable to, and imposed upon any person, by night, unlawfully taking or destroying any game or rabbits on any public road, highway, or path or the sides thereof, or at the opening, outlets, or gates from any such land into any such public road, highway or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway or path where the offender shall be, and the game-keeper or servant of such owner or occupier, and any person assisting such game-keeper or servant, and for all persons authorised by the said act (the 9 Geo. 4, c. 69) to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this act into execution as if the same had been therein specially set forth."

Upon a prosecution under these statutes, the prosecutor must prove: 1st, the former convictions, and the identity of the defendant; 2nd, the committing of the third offence; 3rd, the situation and occupation of the land or road; 4th, the commission of the offence in the place specified.

Proof of the former convictions, &c.] By s. 8, the convictions are to be returned to the sessions, and registered; and may be proved by the production of the records themselves, or of copies thereof. Prove also the identity of the defendant.

Proof of the third offence.] The offence must be proved to have been committed in the *night;* by the 12th section, "the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise." The precise hour laid is not material, provided it appear that the offence was committed within the above hours. See *Tomlinson's case*, 7 *C. & P.* 183.

Proof of the situation and occupation of the land.] The indictment must particularise, in some manner, the place in which the offence was committed; for being substantially a local offence, the defendant is entitled to know to what specific place the evidence is to be directed. *Ridley's case, Russ. & Ry.* 515. "A certain cover in the parish of A." is too general a description. *Crick's case*, 5 *C. & P.* 508. But it has been held sufficient by Gurney, B., to charge entering certain lands in the occupation of A. B., without specifying whether it is inclosed or not. *R.* v. *Andrews*, 2 *Moo. & R.* 37. It is not neces-

sary that the party should be actually seen in the place specified; it is sufficient, if it appear from circumstancial evidence, that he was there. *Worker's case*, 1 *Moody, C. C.* 165. Where the charge is for entering land with a gun, for the purpose of taking game, the purpose must be proved. Where the indictment alleged an entry into a particular close, with intent *then and there* to kill game, it was held, that the intent was confined to the killing of game in that particular place. *Barham's case*, 1 *Moody, C. C.* 151; *Capewell's case*, 5 *C. & P.* 549; *Gainer's case*, 7 *C. & P.* 231. Where it appeared that the prisoners were in Shutt Leasowe, a placed named in the indictment, and which adjoined Short Wood, and were apparently going to the wood, Patteson, J., said "The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose; it is true that they were charged with being in Shutt Leasowe, but they had no intention of killing game there; they must be acquitted." *R.* v. *Davis*, 8 *C. & P.* 759.

A conviction under the 9 Geo. 4, c. 69, s. 1, must allege that the defendants, by night, were in certain land for the purpose of taking game (and as it seems) *by night* in such land. It is not sufficient to follow the precise words of the statute. It would appear, however, that there is a distinction as to this, between summary convictions and misdemeanors under s. 9 of the statute. *Fletcher* v. *Calthrop*, 1 *New Sess. Cases*, 529; *S. C.* 14 *L. J. M. C.* 49.

Limitation of time for prosecutions under the 9 *Geo.* 4, *c.* 69.] By s. 4, prosecutions for offences punishable by summary conviction, must be commenced within six calendar months, and upon indictment or otherwise, within twelve calendar months after the commission of such offences. On the trial of an indictment under the ninth section, for night poaching, it appeared that the offence was committed on the 12th January, 1844, the indictment was preferred on the 1st March, 1845, the warrant of commitment was dated on the 11th Dec. 1844. It was held, that it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence within the 4th section. *R.* v. *Austin*, 1 *C. & K.* 621. So where the offence was committed on the 4th December, 1845; the information and warrant were on the 19th December; one prisoner was apprehended on the 5th September, 1846, and the other on the 21st of October, 1846; and the indictment was preferred on the 5th of April, 1847: it was held that the prosecution was commenced in time. *Brooke's case*, 1 *Den. C. C. R.* 217.

UNLAWFULLY ENTERING LAND FOR THE PURPOSE OF TAKING GAME, BEING ARMED.

By the 9 Geo. 4, c. 69, s. 9, "if any persons to the number of three or more together, shall, by night, unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any such person being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such person shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond

the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland, any person so offending shall be liable to be punished in like manner."

Upon an indictment under this clause of the statute, the prosecutor must prove: 1st, the unlawful entry by night by three persons or more; 2nd, the place in which, &c.; 3rd, the purpose, to take or destroy game or rabbits; 4th, the being armed with a gun, &c.

It has been ruled that a count on this clause may be joined with a count on section 2, (see *post*, p. 541,) and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. *Finacane's case*, 5 *C. & P.* 551. Where a prisoner was indicted for shooting at a gamekeeper, and was also indicted for night-poaching, under the above section; Parke, J., refused to put the prosecutor to his election, the offences being quite distinct, although they related to the same transaction. *Handley's case*, *Id.* 565.

Proof of the entering, &c.] The prosecutor must show that at least three persons entered, or *were* (the words of the statute are, "shall unlawfully enter or be"), by night, in the place specified. It will not, therefore, be necessary to show that they *entered* by night, provided they be in the place within the hours meant by the words "by night," *vide ante*, p. 537. The indictment must state that the entry and arming were by night. Where an indictment stated that the defendants on, &c., did by night enter divers closes, and were then and there in the closes armed, &c.; the judgment was reversed, on the ground that the indictment did not contain a sufficient averment that the defendants were, by night, in the closes armed &c. *Davies* v. *The King*, 10 *B. & C.* 89; see also *Kendrick's case*, 7 *C. & P.* 184; *Wilks's case*, *Id.* 811; *Fletcher* v. *Calthrop*, *ante*, p. 538. It is not necessary to give direct evidence that the men were on the land without the permission of the occupier or landlord; the jury may infer that they were there unlawfully from their conduct and other circumstances. *Wood's case*, 25 *L. J. M. C.* 96.

Proof of the entering or being in the place specified.] The place must be described in the indictment, and the proof must agree with the allegation. See *Frost's case*, *ante*, p. 107. The defendants, to the number of three or more, must be proved to have been in the place named. Where only one defendant was seen in the place charged in the indictment, the others being in a wood separated therefrom by a high road; Patteson, J., held the indictment not proved. *Dowsell's case*, 6 *C. & P.* 398; 1 *Russ. by Grea.* 476 (*n*). In *Whittaker's case*, 1 *Den. C. C. R.*, 310, however, although five of the judges were of opinion that, to constitute a misdemeanor under this section, the party must enter into, and be bodily in the close; and that if three were in the close and three out, the latter were not guilty; and that as the three who, in that case, entered could not be ascertained, all were entitled to be acquitted; yet seven of the judges held, that all the others who were aiding and assisting those who entered the field, were guilty of the same misdemeanor, though they themselves were not in the field, and therefore that the conviction of all the prisoners was good. And see *R.* v. *Scotton*, 5 *Q. B.* 493. In *Whittaker's case*, a particular close was specified in the indictment, but in the subsequent cases of *R.* v. *Eaton and others*, 2 *Den. C. C. R.* 274; *S. C.* 20 *L. J. M. C.* 192, Campbell, C. J., observed, "Some

confusion seems to have arisen in this matter, from not attending sufficiently to the provisions of the act of parliament: it has been treated as though the word *close* occurred in the act, whereas it only specifies '*any land whether open or inclosed;*' a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless;" and Parke, B., adverting to *Hargreave's case*, 1 *Russ. by Grea.* 476, said, "The reasoning appears to me to be founded on the assumption that the statute provided only for the case of three being together in one and the same piece of inclosed land if the land was inclosed, or one and the same piece of land if it was open, whereas the statute contains no such provision." In *R.* v. *Eaton and others*, therefore, the prisoner was held to have been properly convicted, he being one of a party of three, armed with guns, one of whom was in a close occupied by G. W., in which were pheasants, for the purpose of destroying game there, and all of whom were found to have been in another adjoining close of G. W., in which there were not any pheasants, on their way to the former close; one of the counts of the indictment charging the prisoners with being in inclosed land occupied by G. W.

The evidence against the prisoner was, that he and his companions were in a lane, abutting on Wade's close; and that while they were standing in the lane, they spread their nets upon some twigs of the hedge, which separated the lane from the close. On the question being raised, whether this was an entry upon the land; Alderson, B., held, that if the jury were satisfied that, in effecting a common purpose by all the defendants, the nets were hung upon the hedge, so as to be within the field; it was an entry by them all upon the close. *Athea's case*, 2 *Lew. C. C.* 191; but see *contra*, *R.* v. *Nickless*, 8 *C. & P.* 757.

Under the day-poaching act, 1 & 2 Wm. 4, c. 32, s. 30, it has been held, that a person may be convicted of "entering and being" upon land, &c., in pursuit of game, although upon the highway, the prosecutor being the owner of preserves on each side of the road. *R.* v. *Pratt*, 1 *Dears. C. C. R.* 502; *S. C.* 24 *L. J. M. C.* 113.

Proof of the purpose to take or destroy game or rabbits.] In general little difficulty exists with regard to the intent of the defendants. The circumstance of their being found armed is in itself a strong presumption of their object. As to the intent of killing game in the particular place charged in the indictment, see *ante*, p. 537.

Proof of the being armed with a gun, &c.] Though it must be proved that three persons at least were concerned in the commission of the offence, the statute does not require that it should appear that *each* was armed with a gun or other weapon, the words being "*any* of such persons being armed," &c., and this was held upon the former statute, 57 Geo. 3, c. 90, which did not contain the word "any." *Smith's case*, *Russ. & Ry.* 368. It is not necessary that the gun should be found upon any of the defendants. The prisoners were shooting in a wood in the night, and the flash of their guns was seen by a keeper; but before they were seen, they abandoned their guns, and were caught creeping away on their knees. Being convicted, the judges held this a being "found armed" within the 57 Geo. 3, c. 90. *Nash's case*, *Russ. & Ry.* 386. See also *Reg.* v. *Goodfellow and others*, 1 *C. K.* 724, *S. C.*; 1 *Den. C. C. R.* 81, where it was held (overruling on this point *R.* v. *Davis*, 8 *C. & P.* 579), that if one

of a party of three or more poaching in the night-time has a gun, all are armed within the 9 Geo. 4, c. 69, s. 9. See also *Whittaker's case*, 1 *Den. C. C. R.* 310. Where several go out together, and one only is armed, without the knowledge of the others, the latter are not guilty within the statute. *Southern's case, Russ. & Ry.* 444. It must appear that the weapon was taken out with the intention of being unlawfully used. The defendant was indicted for being out at night for the purpose of taking game, armed with a bludgeon. It appeared that he had with him a thick stick, large enough to be called a bludgeon, but that he was in the constant habit of using it as a crutch, being lame. Taunton, J., ruled that it was a question for the jury, whether he took out the stick with the intention of using it as an offensive weapon, or merely for the purpose to which he usually applied it. The defendant was acquitted. *Palmer's case*, 1 *Moo. & Rob.* 70. A walking-stick of ordinary size was ruled to be "an offensive weapon," within the 7 Geo. 2, c. 21. *Johnson's case, Russ. & Ry.* 492. The prisoners were indicted for entering land at night, armed with bludgeons, with intent to destroy game; there was also a count for a common assault. The only weapons proved to have been used by the prisoners were sticks. One of these was produced, with which one of the prisoners, on being attacked by the gamekeeper, had defended himself, and knocked the gamekeeper down. The stick, however, was a very small one, fairly answering the description of a common walking-stick. On its being objected, that the stick could not be considered an offensive weapon within the statute, *Johnson's case* was cited for the prosecution, and it was contended that the use made of the stick by the prisoner showed both his intention and the nature of the stick. Gurney, B., said that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might, perhaps, be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some unexpected attack or collision was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon, within the meaning of the act. The prisoners were convicted of a common assault only. *Fry's case*, 2 *Moo. & Rob.* 42. Large stones are offensive weapons, if the jury are satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. *Grice's case*, 7 *C. & P.* 803.

ASSAULT UPON PERSONS APPREHENDING OFFENDERS.

By 9 Geo. 4, c. 69, s. 2, "where any person shall be found upon any land, committing any such offence as is herein-before mentioned (see *Ball's case, post*), it shall be lawful for the owner or occupier of such land, or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein-before mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being

conveyed before two justices of the peace. And in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner."

On an indictment under this statute, the indictment must state, and the prosecutor must prove: 1st, that the defendant was found upon some land committing one of the offences specified in the 9 Geo. 4, c. 69, s. 1, *ante*, p. 536; 2nd, that he is himself either the owner or occupier of the land, or person having a right of free warren or free chase, or land of the manor, or gamekeeper, or servant of any of the above-named persons, or a person assisting such gamekeeper or servant; 3rd, the assaulting or offering violence, with a gun, &c., at the time of the attempted apprehension. See *R.* v. *Curnock*, 9 *C. & P.* 730.

A gamekeeper, or other person lawfully authorised, may apprehend poachers without giving notice of his purpose. *Payne's case*, 1 *Moo. C. C.* 378, *post*, *title Murder*; *Davis's case*, 7 *C. & P.* 785; *Fielding's case*, 2 *C. & K.* 621; and without any written authority for that purpose. *Price's case*, 7 *C. & P.* 178. But they must be upon the land or manor of his master, for he cannot apprehend them upon the lands of others without authority. *Davis's case*, *supra*. When, therefore, gamekeepers hearing firing in their employer's premises waited for the poachers in the road, and endeavoured to apprehend them there; Wightman, J., held that they were not justified in so doing. *Meadham's case*, 2 *C. & K.* 633.

Although the foregoing section is confined to the offences specified in the first section, yet offenders, under the ninth section, may also be apprehended; for though a greater punishment is inflicted where several are out armed, they are still guilty of an offence under the first section. *Ball's case*, 1 *Moo. C. C.* 330. See *title*, *Murder*.

By the game amendment act, 1 & 2 Wm. 4, c. 32, s. 31, trespassers in search of game may be required to quit the land, and to tell their names and abodes, and in case of refusal may be apprehended and taken before a justice. See *Long's case*, 7 *C. & P.* 314.

GAMING.

When an offence at common law.] GAMING, says Hawkins, is permitted in England, upon every possible subject, excepting where it is accompanied by circumstances repugnant to morality or public policy, or where, in certain special cases, it is restrained by positive statutes. *Hawk. P. C. b.* 1, *c.* 92, *s.* 1. But where the playing is, from the magnitude of the stake, excessive, and such as is now commonly understood by the term "gaming," it is considered by the law as an offence, being in its consequences most mischievous to society. 1 *Russ. by Grea.* 455.

The principal statutory provisions against gaming were contained in the 9 Anne, c. 14 (E.); the 18 Geo. 2, c. 34 (E.); the 10 Wm. 3 (I.); and the 11 Anne (I.); but these statutes, with regard to the punishment of gaming, are repealed by the 8 & 9 Vict. c. 109, s. 15.

By the seventeenth section of the latter statute (E. & I.), which is entitled "An Act to amend the law concerning Games and Wagers," "every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." See *Moss's case*, 5 *Weekly Rep.*, *ante*, p. 464.

As to gaming houses, see 17 & 18 Vict. c. 38, "An Act for the Suppression of Gaming Houses."

As to the suppression of betting houses, see 16 & 17 Vict. c. 119.

HIGHWAYS.

NUISANCE TO HIGHWAYS.

Upon prosecutions for nuisance to a highway, the prosecutor must prove: 1st, that the way in question is a common highway; 2nd, the obstructing of it, or other nuisance.

Proof of the way being a highway.] Every way which is common to the public is a highway. Thus a bridge may be a common highway. 2 *Ld. Raym.* 1174. So a footway; *Logan* v. *Burton*, 5 *B. & C.* 513; for it is a public highway for foot-passengers; *Allen* v. *Ormond*, 8 *East*, 4. So a public bridle-way. *R.* v. *Inhab. of Salop*, 13 *East*, 95. So a towing-path, used only by horses employed in towing vessels, is a highway for that purpose. *Per Bayley, J., R.* v. *Severn and Wye Railway Co.*, 2 *B. & A.* 648. And a railway made under the authority of an act of parliament, which provides that the public shall have the beneficial enjoyment of it, is also a highway, to be used in a particular manner. *R.* v. *Severn and Wye Railway Co.*, 2 *B. & A.* 646. A river which is common to all the king's subjects, has been frequently held to be a highway; and if its course change, the highway is diverted into the new channel.

1 *Rol. Ab.* 390; *Hammond's case*, 10 *Mod.* 382; *Hawk. P. C. b.* 1, *c.* 76, *s.* 1.

It must appear that the highway was a way common to all the king's subjects; for, though numerous persons may be entitled to use it, yet, if it be not common to all, it is not a public highway. Thus a private way, set out by commissioners under an inclosure act, for the use of the inhabitants of nine parishes, and directed to be repaired by them, does not concern the public, nor is of a public nature, but merely concerns the individuals who have a right to use it. *R.* v. *Richards*, 8 *T. R.* 634. In general, the proof of any particular way being a highway, is from the use of it by the public as such for such a number of years as to afford evidence of a dedication by the owner of the soil to the public. The particular manner in which it has been used, says Mr. Starkie, as where it has been used for some public purpose, as conveying materials for the repairs of other highways (*R.* v. *Wandsworth*, 1 *B. & Ald.* 63), or upon any occasion likely to attract notice, is very material; for such instances of user would naturally awaken the jealousy and opposition of any private owner, who was interested in preventing the acquisition of any right by the public; and consequently acquiescence affords a stronger presumption of right, than that which results from possession and user in ordinary cases. 2 *Stark. Ev.* 380, 2*nd ed.* A road may be dedicated to the public for a certain time only, as by the provisions of an act of parliament, and upon the expiring or repeal of the act, its character as a public highway will cease. *Mellor's case*, 1 *B. & Ad.* 32. With reference to this case, however, Patteson, J., in giving judgment in *R.* v. *Landsmere*, 15 *Q. B.* 689; *S. C.* 19 *L. J. M. C.* 215, said, "At the trial I was pressed with *The King* v. *Mellor*, but I cannot help thinking that the court decided on the old doctrine of adoption by the parish through which the road passes, which has been now quite abandoned." In *R.* v. *Landsmere*, a turnpike road, made under a local act, which was to be in force for a limited time, and which had been used by the public both during that time and after its expiration, was held to be a highway which the parish was bound to repair. Where commissioners for setting out roads have exceeded their authority, in directing that certain private roads which they set out, shall be repaired by the township, if the public use such roads, it is a question for the jury whether they have not been dedicated to the public. *Wright's case*, 3 *B. & Ad.* 681. In the same case, Lord Tenterden held, that when a road runs through a space of fifty or sixty feet, between inclosures set out by act of parliament, it is to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road.

Unless there be some one who was capable of dedicating the soil to the public, it seems that a use of it as a highway by them, and repairs done by the parish under a mistaken idea of their liability, will not create such liability, though it would be otherwise if the repairs were done with a full knowledge of the facts, and with an intention of taking upon themselves the burthen. *R.* v. *Edmonton*, 1 *Moo. & R.* 24. Trustees, in whom land is vested for public purposes, may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. *R.* v. *Leake*, 5 *B. & Ad.* 469; 2 *Nev. & M.* 583. See also *Grand Surrey Canal* v. *Hall*, *ante*, p. 320; and *R.* v. *Eastmark*, 11 *Q. B.* 877.

In determining whether or not a way has been dedicated to the

public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. Thus where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land, in such hamlet, should be open to carriages, that the company should pay him 5*s*. a year, and find cinder to repair the way, and that the inhabitants of the hamlet should load and lay down the cinder, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years; it was held, that the evidence showed no dedication, but a licence only, resumable on breach of the agreement. *Barraclough* v. *Johnson*, 8 *A. & E.* 99; and see *R.* v. *Chorley*, 12 *Q. B.* 515.

Now, by the highway act 5 & 6 Wm. 4, c. 50, s. 23, no road or occupation way made, or hereafter to be made by any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out as a private driftway or horsepath, in any award of commissioners under an inclosure act, shall be deemed, &c., a highway which the inhabitants of any parish shall be liable to repair, unless the person, &c., proposing to dedicate such highway to the use of the public, shall give three months' notice in writing to the surveyor of the parish of his intention to dedicate such highway, describing its situation and extent, and shall have made the same in a substantial manner, and of the width required by the act, and to the satisfaction of the said surveyor, and of any two justices, &c., who, on receiving notice from such person, &c., are to view the same and to certify that such highway has been made in a substantial manner, &c., which certificate shall be enrolled at the next quarter sessions, then and in such case, after the said highway shall have been used by the public, and duly repaired by the said person, &c. for twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided that on receipt of such notice as aforesaid, the surveyor shall call a vestry meeting, and if such vestry shall deem such highway not to be of sufficient utility to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway, to appear before the justices at the next special sessions for the highways, and the question as to the utility of such highway shall be determined at the discretion of such justices. This section is not retrospective in respect of roads completely public by dedication at the passing of the act, but applies to roads then made and in progress of dedication. *R.* v. *Westmark*, 2 *Moo. & R.* 305.

According to the opinions of some persons, a way was only a highway when it led directly from a market town, or from town to town. *Hawk. P. C. b.* 1, *c.* 76, *s.* 1. It is said by Lord Hale, that if a way lead to a market, and is a way for all travellers, *and communicates with a great road*, it is a highway; but if it lead only to a church, or to a private house, or to a village, then it is a private way; but it is a matter of fact, and much depends upon common reputation. *Austin's case*, 1 *Vent.* 189. But it is now held to be sufficient if the way in question communicates at its *termini* with other highways. Thus on an indictment for obstructing a passage, which led from one part of a street, by a circuitous route, to another

part of the same street, and which had been open to the public as far back as could be remembered, Lord Ellenborough held this to be a highway; though it was not in general of use to those walking up and down the street, but was only of convenience when the street was blocked up with a crowd. *Lloyd's case*, 1 *Campb.* 260. Whether a street which is not *a thoroughfare* can be deemed a highway, has been the subject of considerable discussion. In the case last cited, Lord Ellenborough said, "I think that, if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say that this right cannot exist, because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in Queen's-square) there is no thoroughfare." The same doctrine was recognised by Lord Kenyon, in the case of *The Rugby Charity* v. *Merryweather*, 11 *East*, 375 (*n*), where he says, "As to this not being a thoroughfare, that can make no difference. If it were otherwise, in such a great town as this it would be a trap to make persons trespassers." The opinions of Lord Kenyon and Lord Ellenborough on this point have, however, been questioned. In *Woodyer* v. *Hadden*, 5 *Taunt.* 125, the court expressed their dissatisfaction with the *dictum* of Lord Kenyon, in the *Rugby case;* and in *Wood* v. *Veal*, 5 *B. & A.* 454, Abbott, C. J., after referring to that case, said, "I have great difficulty in conceiving that there can be a public highway, which is not a thoroughfare, because the public at large cannot be in the use of it;" and similar doubts were expressed by Holroyd and Best, JJ. It may, perhaps, be questioned, whether the reason given by the Chief Justice in the latter case, is a satisfactory one. In many instances, as in that of Queen's-square, mentioned by Lord Ellenborough, the public at large have the use of it, as forming an approach to the houses built around the square. In such cases the proper question seems to be, not whether the place is a thoroughfare, but whether it is in fact useful to the public. In *R.* v. *Marquis of Downshire*, *infra*, Patteson, J., seemed to be of opinion, that if a road long used as a thoroughfare, be lawfully stopped at one end, the right of way over the remainder is not gone.

Where justices in petty session have made an order for stopping a highway, under a local act giving a power of appeal, and the time for appeal has elapsed, it cannot be contended, on an indictment for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty session. But an order made under the 55 Geo. 3, c. 68, s. 2, which enacts, that "where it shall appear upon the view of any two or more" justices that a highway is unnecessary, the same may be stopped by order of such justices; the order is not valid if it state only that the justices *having viewed* the public roads, &c. within the parish, &c. (in which the road lies), *and being satisfied* that certain roads are unnecessary, do order the same to be stopped up, and the objection may be taken at the trial of such indictment. *R.* v. *Marquis of Downshire*, 4 *A. & E.* 698. And see further as to stopping highways, *R.* v. *Cambridgeshire*, *Id.* 111.

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c. should be deemed part and parcel of the townships respectively in which the messuages, &c. were situate. And the commissioners under the act were directed in their award to make such orders as they should think necessary and proper concerning all

public roads, "and in what townships and parish the same are respectively situate," and by whom they ought to be repaired. The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft-road, passed between two allotments. The road was ancient. The part of the common over which it ran before the award, was in the township of H., and the road was still in that township, unless its situation was changed by the local act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable. It was held, that the act by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of roads, and, therefore, that the road in question continued to be in H. It was also held by Lord Denman, C. J., that where the herbage of a road becomes vested by the general inclosure act (41 Geo. 3, c. 109, s. 11), in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors. *R.* v. *Hatfield*, 4 *A. & E.* 156.

By the highway act 5 & 6 Wm. 4, c. 50, ss. 88, 89, persons aggrieved by the decision of the justices in stopping or diverting highways, may appeal to the sessions, where a jury is to determine whether the highways stopped, &c., are unnecessary, or more commodious, &c.

By sec. 92, where a highway is turned or diverted, the parish, or other party liable to repair the old highway, shall repair the new highway, without any reference whatever to his parochial locality.

Where on an indictment for obstructing a highway, a principal question was, whether the way was public or private, and evidence was offered that a person since deceased had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying at the same time, that he planted it to show where the boundary of the road was when he was a boy; it was held, that such declaration was not evidence, either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. *Bliss's case*, 7 *A. & E.* 550.

But on an indictment against a township for non-repair of a road, an indictment against an adjoining township for non-repair of a portion of highway in continuation of the road in question, either submitted to, or prosecuted to conviction, is admissible as evidence to prove the road in question to be a highway. *R.* v. *Brightside Bierlow*, 13 *Q. B.* 933; *S. C.* 19 *L. J. M. C.* 50.

Proof of the highway as set forth.] The highway in question must be proved as set forth in the indictment; but if the description be too general and indefinite, advantage must be taken of that defect by plea in abatement, and not under the general issue. *R.* v. *Hammersmith*, 1 *Stark. N. P. C.* 357; and see *R.* v. *Waverton*, 2 *Den. C. C. R.* 340; *S. C.* 21 *L. J. M. C.* 7. But an indictment describing a way as from A. towards and unto B. is satisfied by proof of a public way leading from A. to B., though it turns backward between A. and B. at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated. B. was a church: the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle; it was held by Lord Denman, C. J., and *semble*, *per Coleridge*, *J.*, that this proof

would not have supported an indictment describing the whole as an immemorial way. *R.* v. *Marchioness of Downshire*, 4 *A. & E.* 232.

An indictment for obstructing a highway (by placing a gate across it), stated the way to be "from the town of C." to a place called H., and charged the obstruction to be "between the town of C." and H. By a local paving act, the limits of the town of C. were defined, and the *locus in quo* was within these limits, and the prosecutors relied on the local turnpike acts, which prohibited the erection of gates within the town. It was held by Patteson, J., that there was a variance, and the indictment could not be sustained, as the terms "from" and "between" excluded the town; and according to the limits defined by the local paving act, on which the prosecutors relied as bringing the obstruction within the other local acts, the obstruction was shown to be in the town. *Fisher's case*, 8 *C. & P.* 612. So where it appeared on a similar indictment, which described the highway as "leading from the township of D. in &c., unto the town of C.," that the gate was put up in the township of D.; Coleridge, J., held, that the defendant must be acquitted, as the words "from" and "unto" excluded the *termini*. *R.* v. *Botfield*, *Carr. & M.* 151; see also *R.* v. *Steventon*, 1 *C. & K.* 55. Where the way was stated to be "for all the liege subjects, &c., to go, &c., with their horses, coaches, carts, and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. *R.* v. *Lyon*, *Ry. & Moo. N. P. C.* 151. Where the way is stated to be a pack and prime way, and appears to be a carriage-way, the variance is fatal. *R.* v. *Inhab. of St. Weonard's*, 6 *C. & P.* 582. But where the indictment alleged an immemorial way, and the evidence proved that the way had been made within legal memory, the variance was held to be immaterial. *Reg.* v. *Norweston*, 16 *Q. B.* 109; *S. C.* 20 *L. J. M. C.* 46; and now see 14 & 15 Vict. c. 100, s. 1, as to the power of amendment in cases of variance between the indictment and the proof.

Proof of the highway as set forth—with regard to the termini.] Although it is unnecessary to state the *termini* of the highway, yet if stated they should be proved as laid. *R.* v. *Upton-on-Severn*, 6 *C. & P.* 133. See also *R.* v. *Norweston*, *supra*.

Proof of changing.] An ancient highway cannot be changed without the king's licence first obtained, upon a writ of *ad quod damnum* and inquisition thereon found, that such a change will not be prejudicial to the public; but it is said that the inhabitants are not bound to watch such new way, or to make amends for a robbery committed therein, or to repair it. 1 *Hawk. P. C. b.* 1, *c.* 76, *s.* 3. A private act of parliament for inclosing lands, and vesting a power in commissioners to set out a new road, is equally strong, as to these consequences, with the writ of *ad quod damnum*. 1 *Burr.* 465. An owner of land over which there is an open road, may inclose it of his own authority; but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. *Ibid.*

The power of widening and changing highways was given to justices of the peace, by the 13 Geo. 3, c. 78, and 55 Geo. 3, c. 68, and is continued to them, under certain modifications, by the recent highway act, 5 & 6 Wm. 4, c. 50.

A statute giving authority to make a new course for a navigable river, along which there is a towing-path, will not take away the right of the public to use that path, without express words for that purpose. *Tippett's case*, 1 *Russ. by Grea.* 347.

Proof of the nuisance—what acts amount to.] There is no doubt but that all injuries whatever to any highway, as by digging a ditch or making a hedge across it, or laying logs of timber on it, or doing any act which will render it less commodious to the public, are nuisances at common law; and it is no excuse that the logs are only laid here and there, so that people may have a passage by winding and turning through them. *Hawk. P. C. b.* 1, *c.* 76, *ss.* 144, 145. So erecting a gate across a highway is a nuisance; for it not only interrupts the public in their free and open passage, but it may in time become evidence in favour of the owner of the soil. *Id. c.* 75, *s.* 9. It is also a nuisance to suffer the ditches adjoining a highway to be foul, by reason of which the way is impaired; or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as to incommode the passage. *Id. c.* 76, *s.* 147; and see 5 & 6 Wm. 4, c. 50. There can be no doubt, that every contracting or narrowing of a public highway is a nuisance: it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public: in these cases it would be for a jury to determine how far the road extended. It seems that in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. 1 *Russ. by Grea.* 350; *Brownlow* v. *Tomlinson*, 1 *M. & Gr.* 484; *Wright's case*, 3 *B. & Ad.* 681; *Reg.* v. *the Birmingham Railway*, 1 *Carr. N. & H.*, *Railway cases*, 317. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, by night and by day, having one waggon at least usually standing before his warehouses, so that no waggon could pass on that side of the street; this was held to be a nuisance, although there was room for two carriages to pass on the opposite side. *Russell's case*, 6 *East.* 427. So keeping coaches at a stand in a street, plying for passengers, is a nuisance. *Cross's case*, 3 *Campb.* 226. So exhibiting effigies at a window, and thereby attracting a crowd. *Carlisle's case*, 6 *C. & P.* 637. Ploughing up a footpath is a nuisance. *Griesley's case*, 1 *Vent.* 4; *Wellbeloved on Highways*, 443, both on the ground of inconvenience to the public, and of injuring the evidence of their title. Where at the trial it appeared, that the defendants were a company, established by deed, for the purpose of lighting the streets of a town with gas, and had obtained a certificate of complete registration under the 7 & 8 Vict. c. 110; that they had opened a trench in one of the streets for the purpose of laying down their mains along the middle of the street; that they had obtained the permission of the highway board as well as of the commissioners for lighting the town appointed under a local act for so doing; and it was admitted that they had used reasonable despatch in laying down the pipes and restoring the road, but during the execution of the works the street was impassable: it was held, that inasmuch as the acts of the defendants were in no respect done in the necessary or proper use of the highway, they were guilty of a

nuisance in obstructing the use of it. *R.* v. *Sheffield Gas Consumers' Company*, 18 *Jur.* 146 (*n*).

The obstruction of a navigable river is likewise a public nuisance, as by diverting part of the water whereby the current is weakened, and made unable to carry vessels of the same burthen as before. *Hawk. P. C. b.* 1, *c.* 75, *s.* 11. The building of a bridge, partly in the bed of a navigable river, will be a nuisance if it obstruct the navigation, but not otherwise. *Reg.* v. *Betts*, 16 *Q. B.* 1022. See also *York and North Midland Railway Comp.* v. *Reg.* (*in error*), 7 *Railw. Cas.* 459. In *R.* v. *Russell*, 3 *El. & Bl.* 942; *S. C.* 23 *L. J.* 173, the jury found that the obstruction, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," upon which the judge directed a verdict of acquittal, and the Court of Queen's Bench held, that the jury must be understood as finding that the obstruction in question was so insignificant as not to constitute a nuisance, and refused to disturb the verdict. But if a vessel sink by accident in a navigable river, the owner is not indictable as for a nuisance in not removing it. *Watt's case*, 2 *Esp.* 675. And where a staith was erected stretching into the river Tyne, and used in shipping coals, whereby the public had a better and cheaper supply of that article, it was held to be no nuisance, *diss.* Lord Tenterden. *Russell's case*, 6 *B. & C.* 566; 9 *D. & R.* 566. But see *Ward's case*, *post.* In *Russell's case*, it was said by Mr. Justice Bayley, in his summing up to the jury, that where a great public benefit accrues, from that which occasions the abridgment of the right of passage, that abridgment is not a nuisance, but proper and beneficial; and he directed the jury to find a verdict for the defendants, if they thought the abridgment of the right of passage was for a public purpose, and produced a public benefit, and if it was in a reasonable situation, and if a reasonable space was left for the passage of vessels navigating the river Tyne. On a motion for a new trial, the Court of King's Bench, with the exception of Lord Tenterden, held this direction right. Lord Tenterden said, "Admitting there was some public benefit both from the price and condition of the coals, still I must own that I do not think those points could be properly taken into consideration, in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of the vessels on the public navigable river was injured by these erections." Where the lessee of the corporation of London, the conservators of the river Thames, erected a wharf between high and low water mark, extending for a considerable space along the river; upon an indictment for a nuisance, it was contended, that as claiming under the corporation, the party had a right to make the wharf. But Abbott, C. J., said, "Will you contend that you have a right to narrow the river Thames, so long as you have space sufficient for the purposes of navigation?" The argument that the wharf was a public benefit, was then advanced; but the Chief Justice said, "Much evidence has been adduced on the part of the defendant, for the purpose of showing that the alteration affords greater facility and convenience for loading and unloading; but the question is, not whether any private advantage has resulted from the alterations to any particular individual, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration." *Lord Grosvenor's case*, 2 *Stark. N. P. C.* 511. *Russell's case* has been overruled by a recent decision. On an indictment for a nuisance

in a navigable river and common king's highway, called the harbour of C., by erecting an embankment in the water-way, the jury found that the embankment was a nuisance, but was counterbalanced by the public benefit arising from the alteration. It was held by the Court of King's Bench, that this finding amounted to a verdict of guilty, and that it is no defence to such an indictment, that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. *Ward's case*, 4 *A. & E.* 384; and see *R.* v. *Morris*, 1 *B. & Ad.* 441; and *R.* v. *Randall*, *Carr & M.* 496. Where on the trial of an indictment for a nuisance by erecting and continuing piles and planking in a harbour, and thereby obstructing it and rendering it insecure, a special verdict was found, that by the defendant's works the harbour was in some extreme cases rendered less secure; it was held, that the defendant was not responsible criminally for consequences so slight, uncertain, and rare, and that a verdict of not guilty must be entered. *Tindall's case*, 6 *A. & E.* 143. Where the crown has no right to obstruct the whole passage of a navigable river, it has no right to erect a weir to obstruct a part, except subject to the rights of the public, and therefore the weir would become illegal upon the rest of the river being so choked, that there could be no passage elsewhere. *Wilcock's case*, 8 *A. & E.* 314.

Proof of the nuisance—authorised by an act of parliament.] By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company of persons authorised by them, were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some cases came within five yards of it. It did not appear whether or not the line could have been made in those instances to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage-road. On an indictment against the company for a nuisance, it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorising the use of the engines, were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not, see *Ward's case, supra*), showed at least, that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. *R.* v. *Pease*, 4 *B. & Ad.* 30.

But where a railway company is authorised by act of parliament to obstruct public or private roads only on a condition which they have not performed, it may be indicted for a nuisance on the old highway. *R.* v. *Scott*, 3 *Q. B.* 543; and see *R.* v. *Rigby*, 14 *Q. B.* 687.

Proof of the nuisance—whether justifiable from necessity.] It not unfrequently becomes a question, whether the obstruction complained of is justifiable by reason of the necessity of the case, as when it occurs in the usual and necessary course of the party's

lawful business. The defendant, a timber-merchant, occupied a small timber-yard close to the street; and, from the smallness of his premises, he was obliged to deposit the long pieces of timber in the street, and to have them sawed up there before they could be carried into the yard. It was argued, that this was necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican. But Lord Ellenborough said, "If an unseasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unseasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises, by taking it in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." *Jones's case*, 3 *Campb.* 230. So although a person who is rebuilding a house is justified in erecting a *hoard* in the street, which serves as a protection to the public; yet, if it encroach unnecessarily upon the highway, it is a nuisance. See *Bush* v. *Steinman*, 1 *Bos. & Pul.* 407; *Russell's case*, 6 *East*, 427, *ante*, p. 551.

Judgment and sentence.] Where a defendant indicted for a nuisance to a navigable river, allowed judgment to go by default, and was under no recognizances to appear in the Court of Queen's Bench for judgment, the court would not, in his absence, give judgment that the nuisance should be abated, although notice had been left at his residence of the intention of the crown to pray for judgment, the proper course being to sue out a writ of *capias* and proceed to outlawry. *Chichester's case*, 2 *Den. C. C. R.* 458.

Abatement of nuisances.] As to the abatement of nuisances, see 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111.

NOT REPAIRING HIGHWAYS.

Upon an indictment for not repairing a highway, to which the general issue is pleaded, the prosecutor must prove: 1st, that the way in question is a public highway (*vide ante*, p. 544, *et seq.*), and that it agrees with the description of the way in the indictment (*ante*, p. 547); 2ndly, that it is within the parish or other district charged; 3rdly, that it is out of repair; and 4thly, where the charge is not upon the parish, but against common right, as upon an individual *ratione tenuræ*, the liability of the party to make the repairs.

Proof of liability to repair—parish.] Parishes of common right are bound to repair their highways, and by prescription one parish may be bound to repair the way in another parish. *Per Holt, C. J.*, *R.* v. *Ragley*, 12 *Mod.* 409; *Hawk. P. C. b.* 1, *c.* 76; *R.* v. *Midville*, 4 *Q. B.* 240. No agreement with any person whatever can

take off this charge. 1 *Ventr.* 90. The parish generally, and not the overseers, is liable; and an indictment against the latter was quashed. *Dixon's case*, 12 *Mod.* 198. If particular persons are made liable by statute to repair, and become insolvent, the parish again becomes liable. 1 *Ld. Raym.* 725. And where a township, which has been accustomed to repair its own ways, is exempted by act of parliament from the repair of a certain road, the liability reverts to the parish. *R.* v. *Sheffield*, 2 *T. R.* 106. The parish will remain liable, though the duty of repairing may likewise be imposed upon others. Thus where a statute enacted, that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held, that the inhabitants of the parish were not exempted from their common law liability to keep the street in repair; and that the parish was under the obligation, in the first instance, of seeing that the street was properly repaired, and might seek a remedy over against the commissioners. *R.* v. *St. George, Hanover Square*, 3 *Campb.* 222. By a navigation act, the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair. Coleridge, J., held, that this did not relieve the townships from their common law liability. *R.* v. *Brightside Bierlow*, 13 *Q. B.* 933; *S. C.* 19 *L. J. M. C.* 50. So where the trustees of a turnpike-road are required by statute to make the repairs, the parish, or other district, is not exonerated, but is liable to be indicted. In such cases, the tolls, granted by the act, are only an auxiliary and subordinate fund, and the persons whom the public have a right to look to, are the inhabitants of the district, who may apply for relief under the 23rd section of the General Turnpike Act. *R.* v. *Netherthong*, 2 *B. & A.* 179; see also *R.* v. *Oxfordshire*, 4 *B & C.* 194; *R.* v. *Preston*, 2 *Lew. C. C.* 193; *R.* v. *Landsmere*, *infra*, p. 545. Nor can other parties render themselves liable to an indictment for not repairing by *agreement*. Thus an indictment against the corporation of Liverpool, stating that they were liable to repair a certain highway, by reason of an agreement with the owners of houses alongside of it, was held bad, because the inhabitants of the parish, who are *primâ facie* bound to repair of all ways within their boundaries, cannot be discharged from their liability by an agreement with others. *R.* v. *Mayor, &c., of Liverpool*, 3 *East*, 86.

If the repairs are done by a parishioner, under an agreement with the parish, in consideration of his being excused his statute-duty, that is virtually a repair by the parish. *Per Lord Ellenborough*, *R.* v. *Wandsworth*, 1 *B. & Ald.* 66.

When by act of parliament trustees are authorised to make a road from one point to another, the making of the entire road is a condition precedent to any part of it becoming a highway repairable by the public. An indictment charged a township with the non-repair of a highway; and it appeared in evidence, that the road in question was begun six years before, under a local turnpike act; that the trustees had finished it all but about 300 yards at one end of the line, and one mile at the other (both out of the township), fenced what they had made, put up two turnpike-gates, and taken toll; that the road was convenient, much used by the public, and leading at each end into old, open, and public highways; but it was

held by Hullock, B., that the indictment was premature, the trustees not having finished their road according to the act of parliament, and consequently that it was no public highway. *R.* v. *Hepworth*, *cited* 3 *B. & Adol.* 110; 1 *Lewin, C. C.* 160. So where trustees, empowered by act of parliament to make a road from A. to B. (being in length twelve miles), completed eleven miles and a half of such road to a point where it intersected a public highway; it was held, that the district in which the part so completed lay, was not bound to repair it. *R.* v. *Cumberworth*, 3 *B. & Ad.* 108; and see *R.* v. *Paddington Vestry*, 9 *B. & C.* 460; *R.* v. *Hatfield*, 4 *A. & E.* 156; *R.* v. *Edge Lane*, *Id.* 723; *R.* v. *Cumberworth*, *Id.* 731.

It was for some time a matter of doubt whether, where an individual dedicated a way to the public, and the public used such way, the parish in which it was situated was bound to repair it, without any adoption of it on their part. In the case of *R.* v. *St. Benedict*, 4 *B. & Ald.* 450, an opinion was expressed by Bayley, J., that the parish was not liable; but this doctrine was denied in a late case, and it was held, that no distinct act of adoption was necessary, in order to make a parish liable to repair a public road; but that, if the road is public, the parish is of common right bound to repair it. *R.* v. *Leake*, 5 *B. & Ad.* 469; 2 *Nev. & M.* 583; *R.* v. *Landsmere*, 15 *Q. B.* 689; *S. C.* 19 *L. J. M. C.* 215, *infra*, p. 545; see also *Rex* v. *the Paddington Vestry*, 9 *B. & C.* 456. See now *ante*, p. 546.

Where a parish is situated partly in one county and partly in another, and a highway, lying in one of those parts, is out of repair, the indictment must be against the whole parish, and must be preferred in that county in which the ruinous part lies. *R.* v. *Clifton*, 5 *T. R.* 498. By the 5 & 6 Wm. 4, c. 50, s. 58, where a highway lies in two parishes, justices of the peace are to determine what parts shall be repaired by each; and by s. 59, parishes are bound to repair the part allotted to them. The same proceeding may be adopted in the case of highways repairable by bodies politic or corporate, or private persons, *ratione tenuræ*.

Where a question arises as to the road being within the boundaries of the parish, it is sometimes necessary to prove those boundaries, by giving in evidence the award of commissioners appointed to set them out. In such case, it must be shown that the award of the commissioners pursues their authority. By an inclosure act, commissioners were directed to fix the boundaries of a parish, and to advertise in a provincial newspaper such boundaries. The boundaries were also to be inserted in the award of the commissioners, and to be conclusive. The boundaries in the award varying from those in the newspaper, it was held, that the commissioners had not pursued their authority, and the award was not binding as to the boundaries of the parish. *Reg.* v. *Washbrook*, 4 *B. & C.* 732. By a similar act, commissioners had power to settle the boundaries of certain parishes, upon giving certain previous notices to the parishes to be affected by the award. The highway in question never having been required by the parish to which it was allotted, the judge refused to admit the award in evidence, until the requisite notices were proved to have been given; and upon an application for a new trial, it was refused. *R.* v. *Hastingfield*, 2 *M. & S.* 558. Where two parishes are separated by a river, the *medium filum* is the boundary. *R.* v. *Landulph*, 1 *Moo. & R.* 393.

On the trial of an indictment for the non-repair of a highway, a map of the parish produced from the parish chest, which map was

made under an inclosure act (which was a private act not printed), is not receivable in evidence to show the boundaries of the parish, without proof of the inclosure act. *Per Erskine, J., R.* v. *Inhabitants of Milton*, 1 *C. & K.* 58. In that case it was proved by the surveyor, who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round and showed them to him. The learned judge held, that the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead, but that, without proof of his death, it was not admissible.

Where a highway crosses the bed of a river which washes over it and leaves a deposit of mud, it seems the parish is not bound to repair that part. *R.* v. *Landulph*, 1 *Moo. & R.* 393. On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged way used to pass. *R.* v. *Paul*, 2 *Moo. & R.* 307.

Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment, which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. *Whitney's case*, 7 *C. & P.* 208.

After a verdict for the defendants on an indictment for the non-repair of a highway, the court will not grant a new trial on the ground of the improper rejection of evidence; but they will suspend the judgment, in order that another indictment may be preferred. *R.* v. *Sutton*, *B. & Ad.* 52; 2 *N. & M.* 57.

An indictment for non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an inclosure act, but since used by the public and repaired by the district charged. *R.* v. *Westmark*, 2 *Moo. & R.* 305.

Proof of liability to repair—inclosure.] Where the owner of lands not inclosed, next adjoining to a highway, incloses his land on both sides the way, he is bound to make the road a *perfect good way*, and shall not be excused by making it as good as it was before the inclosure, if it were then defective; because, before the inclosure, the public used, where the road was bad, to go, for their better passage, over the fields adjoining, which liberty is taken away. And if the owner inclose on one side only, he is bound to repair the whole, if there be an ancient inclosure on the other side; but if there be not such an ancient inclosure, he is bound only to repair half; and upon laying open the inclosure, he is freed, as seems, altogether from the liability to repair. *Hawk. P. C. b.* 1, *c.* 76, *ss.* 6, 7, 8; 3 *Bac. Ab. Highways*, (*F.*); 1 *Russ. by Grea.* 358; *Wellbeloved on Highways*, 90; 2 *Wm. Saund.* 160 (*a*), *n.* (12); *Woolrych on Ways*, 80. But where a highway is inclosed under the directions of an act of parliament for dividing and inclosing common fields, the party inclosing the way is not bound to repair. *R.* v. *Flecknow*, 1 *Burr.* 461. And so also with regard to a road made in pursuance of a writ of *ad quod damnum*. *Ex parte Venner*, 3 *Atk.* 772; *Hawk. P. C. b.* 1, *c.* 76, *s.* 7.

Proof of liability to repair—particular districts and persons by prescription.] Although *primâ facie* the parish is bound to repair all the ways within the boundaries, yet other bodies or individuals may

be liable to such repairs, to the exoneration of the parish. Thus a township, or other particular district, may, by custom, be liable to repair; and it is sufficient to state in the indictment, that the township has been used and accustomed to repair, and of right ought to repair. *R.* v. *Ecclesfield*, 1 *B.* & *A.* 348; *R.* v. *West Riding of Yorkshire*, 4 *B.* & *A.* 623. *R.* v. *Heap*, 2 *Q.* *B.* 128. But where an indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland in the parish of St. Andrew, Auckland, and no consideration was laid for such liability; the indictment was held bad in arrest of judgment, as not showing that the highway was within the defendants' district. But it was held to be no objection that the inhabitants of the three townships were charged conjointly. *R.* v. *Inhabitants of Auckland*, 1 *A.* & *E.* 744.

Where it appears that a township has been used immemorially to repair all roads within it, such township is placed, as to repairs, in the the same situation as a parish, and cannot discharge itself from its liability without showing that some other persons, in certainty, are liable to the repairs. *R.* v. *Hatfield*, 4 *B.* & *A.* 75. Where a new way is made within the limits of the townships, and which, had the parish been bound to repair, must have been repaired by the parish, such way must be repaired by the township. *R.* v. *Ecclesfield*, 1 *B.* & *A.* 348; *R.* v. *Netherthong*, 2 *B.* & *A.* 179. It appears that the liability of a township, or other district, has its origin in *custom* rather than in *prescription;* a prescription being alleged in the person, a custom in the land or place; and the obligation to repair is of a local, and not of a personal nature. *R.* v. *Ecclesfield*, 1 *B.* & *A.* 348. So it is said by Bayley, J., that a parish cannot be bound by prescription; for individuals in a parish cannot bind their successors. *R.* v. *St. Giles, Cambridge*, 5 *M.* & *S.* 260. The inhabitants of a township, or other district, cannot be charged to repair *ratione tenuræ;* for unincorporated inhabitants cannot, as inhabitants, hold lands. *R.* v. *Machynlleth*, 2 *B.* & *C.* 166.

To charge a township with liability by custom to repair all highways within it, which would otherwise be repairable by the parish comprising such township, it is not necessary to prove that there are, or have been, ancient highways in the township. Without such proof, a jury may infer the custom from other evidence. As that the parish consists of five townships, one of which is the township in question; that four have always repaired their own highways; that no surveyor has ever been appointed for the parish, and that the township in question has repaired a highway lately formed within it. *R.* v. *Barnoldswick*, 4 *Q.* *B.* 449. See also *R.* v. *Midville*, *Ibid.* 240.

Upon an indictment against the inhabitants of the township of H., for the non-repair of a highway, a prior judgment of quarter sessions upon a presentment by a justice under the 13 Geo. 3, c. 78 for non-repair of the same highway by H., and which presentment alleged that the highway was in H., and that H. was liable to repair it,—it appearing by the judgment that two of the inhabitants of H. had appeared and pleaded guilty, and that a fine was imposed,—was held to be conclusive evidence that the highway was in H., and that H. was liable to repair it. *R.* v. *Haughton*, 1 *El.* &. *Bl.* 501, *s. c.* 22 *L. J. M. C.* 89. Upon an appeal against the appointment of a

surveyor of the highways for the township of K. N., the sessions found that the parish of M. consisted of two townships; that surveyors had been appointed for each; but latterly, to save expense, there had been two surveyors appointed for the parish at large. They likewise found that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of the highways in each; and the surveyors kept distinct accounts, (which were examined by the general vestry,) and that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate. Lord Tenterden said, that if there had been an indictment against either township, and an allegation that each township had immemorially repaired the roads within it, these facts would be sufficient evidence to support the averment. *R.* v. *King's Newton*, 1 *B.* & *Ad.* 826. On an issue, whether or not certain land, in a district repairing its own roads, was a common highway, it is admissible evidence of reputation, (though slight), that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway; there being at the time no litigation on the subject. *Barraclough* v. *Johnson*, 8 *A.* & *E.* 99; *ante*, p. 545.

It seems that the inhabitants of a district, not included within any parish, cannot be bound to repair the highways within such district. This point arose, but was not decided in the case of *R.* v. *Kingsmoor*, 2 *B* & *C.* 190, which was an indictment against an extra-parochial hamlet. The court held that it should have been shown on the face of the indictment that the hamlet neither formed part of, nor was connected with, any other larger district, the inhabitants of which were liable to the repair of the road in question. Upon this point, the judgment for the crown was reversed; but Best, J., observed, "I can find no authority for saying that any thing but a parish can be charged. If the law authorises no charge except upon parishes, places that are extra-parochial are not, by the general rule of law, liable." See the observations on this case in *Wellbeloved on Highways*, 81.

Proof of liability to repair—corporations.] A corporation, sole or aggregate, may be bound by prescription or usage to repair a highway, without showing that it is in respect either of tenure or of any other consideration. *Hawk. P. C. b.* 1, *c.* 76, *s.* 8; *R.* v. *St. Giles, Cambridge*, 5 *M.* & *S.* 260. A corporation may be indicted in its corporate name for non-repair of a highway. *R.* v. *Mayor*, &c. *of Liverpool*, 3 *East*, 86. *R.* v. *Birmingham* & *Gloucester Railway Company*, 3 *Q. B.* 223.

Proof of liability to repair—private individuals.] A private individual cannot be bound to repair a highway, except in respect of some consideration, and not merely by a general prescription: because no one, it is said, is bound to do what his ancestors have done, except for some special reason, as the having land descending from such ancestors, which are held by such service, &c. *Hawk. P. C. b.* 1, *c.* 76, *s.* 8; *Austin's case*, 1 *Vent.* 189; 13 *Rep.* 33; *R.* v. *St. Giles, Cambridge*, 5 *M.* & *S.* 260. Yet an indictment, charging a tenant in fee simple with being liable to repair, by *reason of the tenure of his land*, is sufficiently certain, without adding that his ancestors, whose estate he has, have always so done, which is implied in the above allegation.

Hawk. P. C. b. 1, *c.* 76, *s.* 8. In order to exempt a parish, by showing that a private person is bound to repair, it must be shown that the burthen is cast upon such other person, under an obligation equally durable with that which would have bound the parish, and which obligation must arise in respect of some consideration of a nature as durable as the burthen. *Per Lord Ellenborough*, *R.* v. *St. Giles, Cambridge*, 5 *M.* & *S.* 260. Where lands, chargeable with the repairs of a bridge or highway, are conveyed to different persons, each of such persons is liable to the charge of all the repairs, and may have contribution from the others; for the law will not suffer the owner to apportion the charge, and thus to render the remedy for the public more difficult. Therefore, where a manor, thus charged, was conveyed to several persons, it was held that a tenant of any parcel, either of the demesnes, or of the services, was liable to the whole repairs. And the grantees are chargeable with the repairs, though the grantor should convey the lands discharged from the burthen, in which case, the grantee has his remedy over against the grantor. *Reg.* v. *Duchess of Buccleugh*, 1 *Salk.* 358; *R.* v. *Buckeridge*, 4 *Mod.* 48; 2 *Saund.* 159 (*n*); 1 *Russ. by Grea.* 358. Where a navigation company was bound under an act of parliament to repair a highway, on an indictment for non-repair, a count alleging the liability to repair *ratione tenuræ* was held bad; but one alleging their liability under the act was held good. *R.* v. *Sheffield Canal Comp.* 13 *Q. B.* 913; *S. C.* 19, *L. J. M. C.* 44.

Repairing a highway for a length of time will be evidence of a liability to repair *ratione tenuræ*. Thus, if a person charged as being bound to repair *ratione tenuræ*, pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant twenty-five years since the removal of the alleged encroachment, that is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show the time when the encroachment was made. *Skinner's case*, 5 *Esp.* 219; 1 *Russ. by Grea.* 359. In determining whether the act of repairing a way is evidence to prove a liability to repair *ratione tenuræ*, the nature of the repairs must be regarded. Thus, it is said by Hullock, B., that an adjoining occupier occasionally doing repairs for his own convenience to go and come, is no more like that sort of repair which makes a man liable *ratione tenuræ*, than the repair by an individual of a road close to his door, is to the repair of the road outside his gate. *Allanson's case*, 1 *Lewin*, *C. C.* 158. In *R.* v. *Blakemore*, 2 *Den. C. C. R.* 410; *S. C.* 21 *L. J. M. C.* 60, evidence was given of the conviction of a former owner and occupier of the lands in respect of which the liability was said to arise, for the non-repair of the same highway, which showed that he had pleaded guilty to a presentment against him, alleging his liability to repair the highway. Repairs by occupiers of the same lands subsequently to this conviction, were also proved; and evidence was given, that the defendant purchased these lands after public notice of the liability to repair the highway, and that he was the owner and occupier of the same; it was held that there was evidence to go to the jury of immemorial usage and liability *ratione tenuræ*. An indictment for the non-repair of a highway in the parish of A., alleging the liability by reason of the tenure of certain lands in the said parish, is not supported by proof of a liability to repair a road extending through A. and other parishes by reason of the tenure of a farm made up of land in A. and the other parishes. *R.* v. *Mizen*, 2 *Moo.* & *R.* 382.

By the 5 & 6 Wm. 4, c. 50, s. 62, highways repaired by parties *ratione tenuræ*, may be made parish highways on payment of an annual sum, to be fixed by the justices.

Proof of the defence—parish.] Upon an indictment against a parish for not repairing, the defendants may show under the plea of not guilty, either that the way in question is not a highway, or that it does not lie within the parish, or that it is not out of repair; for all these are facts which the prosecutor must allege in the indictment, and prove under the plea of not guilty. 2 *Saund.* 158, (*n*) 3; 1 *Russ. by Grea.* 366. But where a parish seeks to discharge itself from its liability, by imposing the burthen of repair upon others, this defence must be specially pleaded, and cannot be given in evidence under the general issue. In such special plea, the parish must show with certainty who is liable to the repairs. *R.* v. *St. Andrews*, 1 *Mod.* 112; 3 *Salk.* 183; 1 *Vent.* 256; *R.* v. *Hornsey*, *Carth.* 212; *Fort.* 254; *Hawk. P. C. b.* 1, *c.* 76, *s.* 9. See also *R.* v. *Eastington*, 5 *A. & E.* 765, where a plea alleging that a particular township had been accustomed to repair all roads within it, "which otherwise would be repairable by the parish at large," was held bad, in arrest of judgment, because it did not aver that the highway was one which but for the custom would be repairable by the parish at large, and did not show what party other than the defendants was liable to repair. But where the burthen of repairs was transferred from the parish by act of parliament, Lord Ellenborough held that this might be shown under a plea of not guilty. *R.* v. *St. George*, 3 *Campb.* 222. Where the parish pleads specially that others are bound to repair, the plea admits the way to be a highway, and the defendants cannot under such plea give evidence that it is not a highway. *R.* v. *Brown*, 11 *Mod.* 273. In order to prove the liability of a parish to repair, when denied under a special plea, the prosecutor may give in evidence a conviction obtained against the same parish upon another indictment for not repairing, and whether such judgment was after verdict or by default, it will be conclusive evidence of the liability of the whole parish to repair. *R.* v. *St. Pancras*, *Peake*, 219; *Whitney's case*, 7 *P. & C.* 208. But *fraud* will be an answer to such evidence. *Peake*, 219. A record of *acquittal* is not admissible as evidence of the non-liability of the parish acquitted, for it might have proceeded upon other grounds than the non-liability of the parish to repair. *Ibid.* But where an indictment has been preferred against a parish consisting of several townships, and a conviction has been obtained, but it appears that the defence was made and conducted entirely by the district in which the way lay, without the privity or consent of the other districts, the indictment will be considered as in substance an indictment against that district only, and the others will be permitted to plead the prescription to a subsequent indictment for not repairing the highways in that parish. 2 *Saund.* 158, *c.* (*n*); *R.* v. *Townsend*, *Doug.* 421. On an indictment for not repairing, against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, where there was a plea on the part of the township of Burton, that each of the three townships had immemorially repaired its own highways separately, it was held, that the records of indictments against the parish generally, for not repairing highways situate in the township of Eardisland, and the township of Hardwicke, with general pleas of not guilty, and convictions thereupon were *primâ facie* evidence to disprove the custom for each township to repair separately,

but that evidence was admissible to show that these pleas of not guilty were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton. *R.* v. *Eardisland*, 2 *Campb.* 494.

Proof for the defence—district or private individual.] Where a particular district, not being a parish, or where a private individual by reason of tenure, is indicted for not repairing a highway, as the prosecutor is bound to prove the special ground of their liability, viz. custom or tenure, under the plea of not guilty, so the defendants are at liberty under that plea to show that no special grounds exist. In such case, it is not necessary for the defendants after disproving their own liability to go further, and prove the liability of others. But if, as in the case of a parish, they choose, though unnecessarily, to plead the special matter, it has been held that it is not sufficient to traverse their own liability, but that they must show in particular who is bound to repair. *R.* v. *Yarnton*, 1 *Sid.* 140; *R.* v. *Hornsey*, *Carth.* 213; 2 *Saund.* 159, *a* (*n*) 1; 1 *Russ. by Grea.* 367. Where charged *ratione tenuræ*, the defendant may show that the tenure originated within the time of memory. *Hayman's case*, *M. & M.* 401. It has been held by Maule, J., that evidence of reputation is not admissible to show a liability in the occupiers of land to repair a road *ratione tenuræ*. *R.* v. *Wavertree*, 2 *Moo. & R.* 353. But this case must be considered as overruled by *R.* v. *Bedford*, 24 *L. J. Q. B.* 81, *infra*, p. 323. Where the land over which the road passed was washed away by the sea, the liability of the defendant, charged *ratione tenuræ*, was held to have ceased. *R.* v. *Bamber*, 5 *Q. B.* 279.

Particulars of the highways obstructed, &c.] On an indictment for obstructing divers horse and carriage ways, and footpaths, Parke, B., upon the production of an affidavit from the attorney for the defendant, that he was unable to understand all the precise tracks indicted, made an order for the delivery of particulars of the ways in question, which were nine in number, seven described, generally, as highways, and two described as footways. *R.* v. *Marquis of Downshire*, 4 *A. & E.* 699.

Costs, &c.] By the 5 & 6 Wm. 4, c. 50, s. 98, the court before whom any indictment for not repairing highways is preferred may award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous and vexatious. By sec. 99, presentments on account of highways or turnpike roads, being out of repair, are abolished. See as to costs, *Reg.* v. *Inhab. of Hickling*, 7 *Q. B.* 890; *s. c.* 15 *L. J. M. C.* 23; *Reg.* v. *Down Holland*, 15 *L. J. M. C.* 25. *R.* v. *Clarke*, 5 *Q. B.* 887. See *Reg.* v. *Inhab. of Yorkhill*, 9 *C. & P.* 218; *Reg.* v. *Inhab. of Chedworth*, 9 *C. & P.* 285, *and* 1 *Russ. by Grea.* 374 (*n*); *Reg.* v. *Inhab. of Preston*, 1 *C. and K.* 137; *Reg.* v. *Merionethshire*, 6 *Q. B.* 343; *Reg.* v. *Inhab. of Heanor*, 6 *Q. B.* 745; *Reg.* v. *Inhab. of Pembridge*, 3 *Q. B.* 901; 3 *G. & D.* 5; *Reg.* v. *Inhab. of Paul*, 2 *Moo. & R.* 307, *and Reg.* v. *Inhab. of Chilicombe*, therein cited, p. 311; *Reg.* v. *Inhab. of Great Broughton*, 2 *Moo. & R.* 444. See further, title *Bridges*.

The amount of costs must be ascertained and ordered by the same sessions; the sessions cannot refer the costs to be taxed by their officer after the sessions. *R.* v. *Lambeth*, 3 *C. L. R.* 35.

In Ireland, the 8 Anne, c. 5, s. 4, made perpetual by 4 Geo. 3. c. 9, provides that if any indictment or presentment be against any person or persons for not repairing any highways, causeways, pavements, or bridges, and the right and title to repair the same, shall come in question; upon a suggestion to that effect and an affidavit made of the truth thereof, a *certiorari* may be granted to remove the same into the court of Queen's Bench, provided that the party or parties prosecuting such *certiorari* shall find two manucaptors to be bound in a recognizance with condition as aforesaid.

The statutes in Ireland which authorise the making and repairing of roads and bridges at the expense of the respective counties are the 19 & 20 Geo. 3, c. 41; 36 Geo. 3, cc. 36, 55; 37 Geo. 3, c. 35; 45 Geo. 3, c. 43; 46 Geo. 3, c. 96; 49 Geo. 3, c. 84; 50 Geo. 3, c. 29; 53 Geo. 3, cc. 77, 146; 59 Geo. 3, c. 84; 6 Geo. 4, c. 101; 1 & 2 Wm. 4, c. 33; 3 & 4 Wm. 4, c. 78. See also, on the subject of highways in Ireland, *Gabbett's Crim. Law of I. Book* 1, *c.* 39.

HOMICIDE.

Those homicides which are felonies, viz. murder and manslaughter, will, for the convenience of reference, be treated of under separate heads; but as the shades between the various kinds of homicide, are in many cases very faint, and require the circumstances to be stated at large, it has been thought better to collect all the decisions under one head, viz., that of murder, in order to avoid repetition, and to this part of the work, therefore, the reader is referred on the subject of homicide in general. It will be useful, however, in this place, to distinguish the nature of the different kinds of homicide, not amounting to felony.

Homicides not felonious, may be divided into three classes, justifiable homicide, excusable homicide, and homicide by misadventure.

Justifiable homicide is where the killing is in consequence of an imperious duty prescribed by law, or is owing to some unavoidable necessity induced by the act of the party killed, without any manner of fault in the party killing. 1 *East, P. C.* 219; *Hawk. P. C. b.* 1, *c.* 28, *ss.* 1, 22.

Excusable homicide is where the party killing is not altogether free from blame, but the necessity which renders it excusable, may be said to be partly induced by his own act. Formerly in this case it was the practice for the jury to find the fact specially, and upon certifying the record into Chancery, a pardon issued, of course, under the statute of Gloucester, c. 9, and the forfeiture was thereby saved. But latterly it was usual for the jury to find the prisoner not guilty. 1 *East, P. C.* 220. And now by the 9 Geo. 4, c. 31, s. 10, (the 10 Geo. 4, c. 34, s. 13, I.), no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in self-defence, or in any other manner without felony.

Homicide *by misadventure*, is where a man doing a lawful act, without any intention of bodily harm, and after using proper precaution to prevent danger, unfortunately kills another person. The act upon which the death ensues, must be lawful in itself, for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as (formerly) the shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head, are—1, where death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico;* and 3, from acts lawful or indifferent in themselves, done with proper and ordinary caution. Homicide by *chance-medley* is, strictly, where death ensues from a combat between the parties upon a sudden quarrel; but it is frequently confounded with misadventure or accident. 1 *East, P. C.* 221.

HOUSEBREAKING, *see* DWELLING-HOUSE.

ILL-TREATING APPRENTICES, SERVANTS, AND HELPLESS PERSONS.

In cases of apprentices or servants.] The 14 & 15 Vict. c. 11, s. 1, enacts, that "where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse, refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully or maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years."

Sect. 2 enacts, that "the costs and expenses of the prosecution of any such misdemeanor, as aforesaid, may be allowed and ordered by the court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the 7 Geo. IV., c. 64, or may be allowed and ordered by the Court of Queen's Bench, in case the indictment shall have been removed into that court, to be paid by the treasurer of the county or other officer, who would have been liable to pay under the order of the court in which, but for such removal, the indictment would have been tried."

And sect. 6 enacts, that "where any complaint shall be made of an offence against this act, or of any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted; and the circumstances of which offence amount in point of law to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony; and two justices of the peace, before whom the examination is taken, shall certify under their hands, that they deem it necessary for the purposes of public justice, that the prosecution should be conducted by the guardians of the union or of the parish, or where there are no guardians, by the overseers of the parish, in which the offence shall have been committed; such guardians or overseers, as the case may be, shall, upon personal service of such certificate, or a duplicate thereof upon the clerk of such guardian, or upon any one of such overseers, conduct the prosecution, and shall pay the costs, reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of the court trying the indictment, or of the court of Queen's Bench) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers (as the case may be) of such parish."

It has been held, that a master is not bound by law to furnish medical advice for his servant; but that it is otherwise in the case of an apprentice, and that a master is bound, during the illness of his apprentice, to furnish him with proper medicines.

In cases of children of tender years.] If a person be under an obligation to support a child, an indictment charging a breach of such duty must aver that an injury was done to the child thereby. This rule was laid down by Parke, B., as that to be gathered from the authorities, in *Hagan's case*, 2 *Den. C. C. R.* 277; *S. C.* 20 *L. J. M. C.* 219. In *Philpott's case*, 1 *Dears. C. C. R.* 179; *S. C.* 22 *L. J. M. C.* 113, this rule was acted upon by the court of Criminal Appeal. The indictment in that case was against the mother of the child, and stated that "she did unlawfully and wilfully neglect to support and maintain the said infant child or to furnish the said infant child with necessary and proper food and clothing, and did then unlawfully and wilfully desert and abandon the said infant child, and did leave the said infant child without proper food or clothing, &c., by reason of which said unlawful and wilful neglect, desertion, and abandonment, the said infant child then became, and was *greatly injured and weakened.*" It was held, that these latter words were material, and that they were not sufficiently proved by evidence; "that the child had suffered injury, but not to any serious extent." In delivering the judgment of the court, Jervis, C. J., said, "In order to make out the offence, there must be an averment and proof that injury was done to the child's health. * * * The evidence shows that the witness was of opinion that the children had suffered some injury but not to any serious extent. The court are of opinion, that a degree of injury 'to some, but not to any serious extent,' is not sufficient to constitute an offence of this description. We think we may adopt the language of the judges in *Friend's case* (*Russ. & Ry.* 20), that in order to constitute an offence indictable as a misdemeanor, it is necessary to state a breach of duty or contract in refusing or neglecting to provide for an infant of tender years unable to provide for itself, and that the health of the infant has been injured by the neglect. The legislature has, to a certain extent, given a guide to the amount of injury necessary to constitute the offence in the statute 14 & 15 Vict. c. 11. In section 1, it makes indictable as a misdemeanor the offence of not finding apprentices and young persons with proper food, clothing, and lodging, 'whereby the health of such person shall have been, or shall be likely to be permanently injured;' making the offence then to depend on the permanent injury, or on the injury to the health." See also *Pelham's case*, 8 *Q. B.* 959; *S. C.* 15 *L. J. M. C.* 105, and *Renshaw's case*, 2 *Cox C. C.* 285; *S. C.* 11 *Jurist*, 615.

The point whether a person is indictable for abandoning a child of tender years, so that such child thereby becomes chargeable to a parish, has been brought before the Court of Criminal Appeal in two cases; *Cooper's case*, 1 *Den. C. C. R.* 459; *S. C.* 18 *L. J. M. C.* 168, and *Hogan's case*, 2 *Den. C. C. R.* 277; *S. C.* 20 *L. J. M. C.* 219; but in the former case the indictment did not allege that the child was not legally settled in the parish in which it had been left by its mother; and in the latter, it was held to be a fatal objection to the indictment that it did not contain an averment that the prisoner had the means of supporting the child. See the note to *Renshaw's case*, 2 *Cox, C. C.* 285.

A single woman, the mother of an infant child, was indicted for neglecting to furnish it with food, the indictment alleging that she was able and had the means to do so. There was no evidence of the actual possession of means by the mother; but it was proved that she could have applied to the relieving officer of the union, and that if she had so applied, she would have been entitled to, and would have received relief, adequate to the due support and maintenance of herself and child. The prisoner having been convicted, the court of Criminal Appeal quashed the conviction. The case was not argued by counsel, but the court in giving judgment said, "The allegation in the indictment is, that the prisoner being able and having the means, neglected to maintain her child. We are of opinion that there was no evidence that she had the means of supporting it, and therefore that the allegation is not made out. To show that she might by possibility have obtained the necessary means is not sufficient."

See also as to aggravated assaults on children, 16 & 17 Vict. c. 30, s. 1, *ante*, p. 287.

Lunatics, &c.] The 16 & 17 Vict. c. 96, s. 9, enacts that "if any superintendent officer, nurse, attendant, servant, or other person employed in any registered hospital, or licensed house, or any person having the care or charge of any single patient, in any way abuse, or ill-treat, or wilfully neglect, any patient in such hospital, or house, or such single patient; or if any person detaining, or taking, or having the care or charge, or concerned in taking part in the custody, care, or treatment, of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic, or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for every such offence, on a summary conviction thereof, before two justices, any sum not exceeding 20*l.*"

A husband having been tried and convicted under this statute, for that he, having the care and charge of his wife, a lunatic, did abuse and ill-treat her; upon a case reserved, the court held that he was not a person having the care and charge of a lunatic within the meaning of the statute, which was not intended to apply to persons whose care or charge arose from natural duty. *Rundle's case*, 1 *Dears. C. C. R.* 432; *S. C.* 24 *L. J. M. C.* 129.

INCITING TO MUTINY.

By 37 Geo. 3, c. 70, s. 1 (E.), and the 37 Geo. 3, c. 40, s. 1 (I.) (which acts were revised and made perpetual by the 57 Geo. 3, c. 7, U. K.), after reciting that divers wicked and evil disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, had of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land, from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience; it is enacted, "that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces, by sea or land, from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, [and shall suffer death, as in cases of felony, without benefit of clergy."]

S. 2, provides and enacts, "that any offence committed against this act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer, or gaol delivery for any county of that part of Great Britain called England, in such manner and form as if the said offence had been therein committed."

By the 7 Wm. 4 & 1 Vict. c. 91 (U. K.), s. 1, after reciting (*inter alia*) the above statutes, it is enacted, "that if any person shall, after the commencement of this act, be convicted of any of the offences herein-before mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 2, hard labour and solitary confinement may be awarded in cases of imprisonment.

The annual mutiny acts make it a misdemeanor for every person who shall, in any part of her Majesty's dominions, directly or indirectly persuade any soldier to desert.

KIDNAPPING.

KIDNAPPING, which is an aggravated species of false imprisonment, is the stealing and carrying away or secreting of any person, and is an offence at common law, punishable by fine and imprisonment. 1 *East, P. C.* 429. By the habeas corpus act, 31 Car. 2, c. 2, s. 12, the sending prisoners out of England, is made punishable as a *præmunire*, and by the 11 & 12 Wm. 3, c. 7, masters of vessels forcing their men on shore or leaving them behind, were subjected to three months' imprisonment.

This statute is repealed by the 9 Geo. 4, c. 31, which enacts, s. 30, "that if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such a term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his Majesty's attorney-general, in the court of King's Bench, and may be alleged in the indictment or information to have been committed at Westminster, in the county of Middlesex; and the said court is hereby authorised to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same shall be received in evidence on the trial of every such information."

By the 7 & 8 Vict. c. 112 (U. K.), s. 47, "if the master of any ship belonging to any of her Majesty's subjects, or the mate or other officer of such ship, shall wrongfully force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind on shore or at sea, in or out of her Majesty's dominions, any person belonging to his ship or crew, before the completion of the voyage, for which such person was engaged, or the return of the ship to the United Kingdom, such master, mate, or other officer, shall be guilty of a misdemeanor; and every misdemeanor mentioned or created by this act shall and may be prosecuted by information at the suit of her Majesty's attorney-general, or by indictment or other legal proceeding in any court having criminal jurisdiction in her Majesty's dominions at home or abroad, and the offence may be laid and charged in the said information, indictment, or other legal proceeding, to have been committed in the county or place where the offender shall happen to be, who being convicted thereof, shall be liable to fine or imprisonment, or both, as to the court before whom he is tried shall seem meet; and every court is hereby authorised to issue a commission or commissions for the examination of any witness or witnesses who may be absent or out of the jurisdiction of the court; and at the trial the depositions

taken under such commission or commissions, if such witness or witnesses shall be then absent, shall be received in evidence."

By s. 48, "if any master shall, contrary to the provisions of this act, discharge, abandon, or leave behind any seaman or other person belonging to the ship or crew, with or without his consent, it shall be incumbent on such master, on any information, indictment, or other proceeding against him, to produce or prove such sanction or respective certificate as aforesaid (see s. 46), or prove the impracticability of obtaining such certificate."

As to abducting females and children, see *ante, tits. Abduction* and *Child-stealing.*

LARCENY.

Definition, &c.] LARCENY has been defined to be "the wrongful or fraudulent taking and carrying away, by one person, of the mere personal goods of another, from any place, with a felonious intent to convey them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 *East, P. C.* 553. Parke, B., in giving judgment in *Holloway's case*, 1 *Den. C. C. R.* 375, cites this definition with approbation, but adds: "This definition needs some addition; the taking should be not only wrongful and fraudulent, but should also be without any colour of right. All the cases show that if the intention were not to take the entire dominion over the property there is no larceny." In the above case the prisoner was indicted for stealing skins of leather. The jury had returned a special verdict, "that the prisoner took the skins, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and to get paid by his master for them." They had not been dressed by the prisoner, but by another workman. This was held not to be a larceny.

Larceny was formerly divided into grand larceny, where the value of the property was above twelve pence, and petty larceny where the value was twelve pence or under, but now by the 7 & 8 Geo. 4, c. 29, s. 2 (9 G. 4, c. 55, s. 2, I.), it is enacted, "that the distinction between grand larceny and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed

to be of the same nature, and shall be subject to the same incidents in every respect, as grand larceny was, before the commencement of the act, and every court whose power as to the trial of larceny was, before the commencement of the act, limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment in the act after mentioned for simple larceny; and also to try all accessaries to such larceny."

*The 14 & 15 Vict. c. 100, s. 18, *ante*, contains a provision as to the mode in which money or banknotes may be described in an indictment. See *Bond's case*, 1 *Den. C. C. R.* 517.

By the 14 & 15 Vict. c. 100, s. 16, "it shall be lawful to insert several counts in the same indictment, against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, to proceed thereon for all or any of them."

By s. 17, "if, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not, by reason thereof, be required to select upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings."

By s. 3, of the 7 & 8 Geo. 4, c. 29, "every person convicted of simple larceny, or of any felony made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

By s. 4, hard labour and solitary confinement may be awarded in cases of imprisonment, but by the 7 Wm. 4 & 1 Vict. c. 90 (U. K.), s. 5, no offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.

But now, by 12 Vict. c. 11, s. 1, "so much of the recited provisions of the said acts respectively, as makes any person convicted of simple larceny, or of any felony by such acts respectively, made punishable like simple larceny (except in the cases thereinafter otherwise provided for), liable to be transported beyond the seas for the term of seven years, shall be repealed, but every person so convicted shall be liable, at the discretion of the court, to be otherwise punished as by the said acts respectively is provided."

By section 2, tenants and lodgers stealing from houses or apartments let to them, if the value exceed 5*l.*, are punishable as before the passing of this act.

By s. 3, larceny, &c., after two previous summary convictions, is punishable as before the passing of the act.

And by 18 & 19 Vict. c. 122, ss. 1, 2, power is given to justices at petty sessions to punish, summarily, persons charged with larceny, when the value of the property stolen does not, in the judgment of the

justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny; but the justices are required to ask the accused whether he consents to the charge being summarily determined, and if the prisoner does not consent, the justices are to deal with the cases as if this act had not passed. In such cases the punishment must not exceed three months' imprisonment.

By s. 3, persons charged with larceny in cases where the property stolen exceeds five shillings, or with stealing from the person, or larceny as a clerk or servant, may plead guilty before justices in petty sessions, and be sentenced forthwith to imprisonment for a period not exceeding six months; but the justices are required to warn the prisoner that he is not obliged to plead.

By s. 4, the prisoner is allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

By s. 11, every conviction by justices in petty sessions under this act, shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this act shall be attended with any forfeiture.

Proof of the lucri causâ.] Larceny is defined by Eyre, B., to be "the wrongful taking of goods, with intent to spoil the owner of them, *lucri causâ.*" *Pear's case*, 2 *East, P. C.* 685. And in the same manner Mr. Justice Blackstone says, that "the taking must be felonious, that is, done *animo furandi*, or as the civil law expresses it, *lucri causâ*," 4 *Com.* 232. The expression, *lucri causâ*, must not, as it seems, be understood to convey any further meaning, than that expressed in Mr. East's definition, "a felonious intent, to convert the goods to the taker's own use, and make them his own property," *vide supra*. It is not necessary that the offender should contemplate any thing in the nature of a pecuniary advantage. Thus, in the following case, where the object was to destroy the property, the offence was still held to be larceny. The prisoner, in conjunction with the wife of a man, who was charged with stealing a horse, went to the stable of the owner, took the horse out, and backed it into a coal pit. It was objected for the prisoner, on an indictment for stealing the horse, that it was not taken *animo furandi*, and *lucri causâ*. The prisoner being convicted, the opinion of the judges was taken, who thought the conviction right. Six of the judges held it not to be essential to constitute the offence of larceny, that the taking should be *lucri causâ*. They thought that a taking fraudulently, with an intent wholly to deprive the owner of the property was sufficient; but some of the six thought, that in this case the object of protecting the party charged with stealing the horse might be deemed a benefit, or *lucri causâ*. Two of the judges held the conviction wrong. *Cabbage's case*, *Russ. & Ry.* 292. Upon this case it is observed in the report of the criminal law commissioners (p. 17), that where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief. A. was supplied with a quantity of pig-iron by B. & Co. his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle-bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron; the value of the axle to B. & Co. was 7*s*., but the gain to the prisoner by melting it, and thus increasing the quantity of metal which

ran from the furnace, was 1*d*. Tindal, C. J., held that if the prisoner put the axle into the furnace with a felonious intent to convert it to a purpose for his own profit, it was a larceny. *R.* v. *Richards*, 1 *C. & K.* 532. In the following case, the *lucri causâ* appears not to have been considered as a necessary ingredient of larceny. The prisoners were charged with stealing a quantity of beans. They were servants of the prosecutor, and took care of his horses, for which the prosecutor made an allowance of beans. The prisoner had entered the granary by a false key, and carried away a quantity of the beans which they gave to the prosecutor's horses. Bailey, J., had directed an acquittal in a similar case; but Abbott, J., being informed that several judges had, under the same circumstances, held the offence to be larceny, reserved the point. Eleven of the judges having met, eight were of opinion that it was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost the beans, or had them applied to the injury of his horses, but the men's labour was lessened, so that the *lucri causâ*, to give themselves ease, was an ingredient in the case. Three of the judges thought it no felony. *Morfit's case*, *Russ. & Ry.* 307.

This decision has since been acted upon in *Handley's case*, *Car. & M.* 547, where Patteson, J., said, "I have conferred with Mr. Justice Cresswell, and we both think that the case of *Rex* v. *Morfit* is too recently decided by a large majority of the judges for me to take the opinion of the judges again upon the point." But in *Privett's case*, 1 *Den. C. C. R.* 193, the point was again reserved. The jury found that the prisoners "took the oats with the intent of giving them to their master's horses, and without any intent of applying them for their private benefit." "The greater part of the judges present (exclusive of Erle, J., and Platt, B.,) appeared to think that this was larceny, because the prisoners took the oats knowingly against the will of the owner, and without any colour of title or of authority, with intent not to take temporary possession merely and then abandon it (which would not be larceny), but to take the entire dominion over them, and that it made no difference that the taking was not *lucri causâ*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed, that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided, if the matter were *res integra*. Erle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded, in the opinion of some of the judges, on the supposition that the prisoners would gain by the taking, which was rejected in this case; and they were of opinion that the taking was not felonious, because to constitute a larceny, it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use." *MS.* of *Parke, B.*, as given in *Denison*.

The prisoner, a servant of A., applied for and received at the post-office all A.'s letters, and delivered them to A., with the exception of one, which the prisoner destroyed in the hope of suppressing injuries respecting her character. This was held to be a larceny; "for supposing that it was a necessary ingredient in that crime, that it

should be done *lucri causâ* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character." *Elizabeth Jones's case*, 1 *Den. C. C. R.* 180.

An unauthorised gift by a servant of his master's goods is as much a felony as if he had sold or pawned them. *Per Erskine, J.*, *R.* v. *White*, 9 *C. & P.* 344.

The rule with regard to the *lucri causâ* is stated by the criminal law commissioners in the following terms: "The ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." 1*st Rep.* p. 17.

Proof of the taking.] The following is the definition of a felonious taking given by the criminal law commissioners: "The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property against his will." 1*st Rep.* p. 16.

Where goods are once taken with a felonious intent, the offence cannot be purged by a restoration of them to the owner. Thus the prisoner having robbed the prosecutor of a purse, returned it to him again, saying, if you value the purse take it, and give me the contents, but before the prosecutor could do this the prisoner was apprehended; the offence was held to be complete by the first taking. *Peat's case*, 2 *East, P. C.* 557; see also *Wright's case*, 2 *Russ. by Grea.* 7, and 9 *C. & P.* 554 (*n*); and *R.* v. *Phetheon*, 9 *C. & P.* 552. Where the only evidence offered against the prisoner was that he was employed on the premises of the prosecutor, and that he had been seen going into the place where the brass alleged to have been stolen was kept, it was held, that there was not a scintilla of evidence to go to the jury. *Walker's case*, 1 *Dears. C. C. R.* 280.

Proof of the taking—what manual taking is required.] In order to constitute the offence of larceny, there must be an actual taking, or severance of the thing, from the possession of the owner; for as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be guilty of a felony in carrying them away. Thus, A. owing money to the prosecutor, the prisoner said he could settle the debt on A.'s behalf, and taking a receipt from his pocket put it on the table, and then took out some silver in his hand. The prosecutor wrote a receipt for the sum mentioned on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money he said, "It is all right;" but never paid it. It was held, that this was not a larceny, as the prosecutor never had such a possession as would enable him to maintain trespass. *John Smith's case*, 2 *Den. C. C. R.* 449; *S. C.* 21 *L. J. M. C.* 111. Still, though there must be a taking, in fact, from the actual or constructive possession of the owner, yet it need not be by the very hand of the party accused. For if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had

taken them himself; as if one procure an infant, within the age of discretion, to steal the goods for him, or if, by fraud or perjury, he get possession of the goods by legal process without title. 2 *East, P. C.* 555; 2 *Russ. by Grea.* 5. See also *R.* v. *J. Williams*, 1 *C. & K.* 195.

The least removing of the thing taken, from the place where it was before, though it is not quite carried off, is a sufficient taking and carrying away to constitute larceny; and upon this ground a guest, who had taken the sheets from his bed with an intent to steal them, and carried them into the hall, where he was apprehended, was adjudged guilty of larceny. *Hawk. P. C. b.* 1, c. 35, s. 25; 3 *Inst.* 108; 2 *East, P. C.* 555; 1 *Leach*, 323; see also *Samways's case*, 1 *Dears. C. C. R.* 371. So where a person takes a horse in a close, with intent to steal him, and is apprehended before he can get him out of the close, 3 *Inst.* 109; see further as to cattle, *Williams's case*, 1 *Moo. C. C.* 107, *ante*, p. 360. The prisoner got into a waggon, and taking a parcel of goods which lay in the fore-part, had removed it to near the tail of the waggon, when he was apprehended. The twelve judges were unanimously of opinion, that as the prisoner had removed the property from the spot where it was originally placed, with an intent to steal, it was a sufficient *taking* and *carrying away* to constitute the offence. *Coslet's case*, 1 *Leach*, 236; 2 *East, P. C.* 556. But where the prisoner had set up a parcel containing linen, which was lying lengthways in a waggon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken any thing, all the judges agreed that this was no larceny, although the intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them. *Cherry's case*, 2 *East, P. C.* 556; 1 *Leach*, 236 (*n*). The following case, though nearly resembling the latter, is distinguished by the circumstance that every part of the property was removed. The prisoner sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and both holding it endeavoured to pull it out, but were prevented by the guard. The prisoner, being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. *Walsh's case*, 1 *Moo. C. C.* 14. The prisoner was indicted for robbing the prosecutrix of a diamond ear-ring. It appeared that as she was coming out of the opera-house, the prisoner snatched at her ear-ring, and tore it from her ear, which bled, and she was much hurt. The ear-ring fell into her hair, where it was found on her return home. On a case reserved, the judges were of opinion that this was a sufficient taking to constitute robbery; it being in the possession of the prisoner for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant that it was taken. *Lapier's case*, 2 *East. P. C.* 557; 1 *Leach*, 320. Where a servant *animo furandi* took his master's hay from his stable, and put it in his master's waggon, it was held to be larceny. *R.* v. *Gruncell*, 9 *C. & P.* 365. There must, however, be a possession by the party charged, however temporary.

The prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him. The prosecutor laid the bed down; but before the prisoner could take it up he was apprehended. The judges were of opinion that the offence was not completed. *Farrel's case*, 2 *East*, *P. C.* 557.

There must be a severance of the goods from the possession of the owner. The prisoner took a purse out of the pocket of the owner, but the purse being tied to a bunch of keys, and the keys remaining in his pocket, and the party being apprehended while they remained in his pocket, it was held no larceny, on the ground that the owner still remained in possession of his purse; and that there was no *asportavit*. *Wilkinson's case*, 1 *Hale*, *P. C.* 508. So where goods in a shop were tied to a string, which was fastened to one end of the bottom of the counter, and the prisoner took up the goods and carried them towards the door as far as the string would permit, and was then stopped, Eyre, B., ruled that there was no severance, and consequently no felony. *Anon.* cited in *Cherry's case*, 2 *East*, *P. C.* 556; 1 *Leach*, 321 (*n*).

The prisoner was indicted for stealing five thousand cubic feet of gas. The gas company had contracted to supply him with gas to be paid for by meter. The gas was received from the company's main into an entrance pipe belonging to the prisoner, and passed through the meter which the prisoner had hired of the company into another pipe, the property of the prisoner, called the exit-pipe, which fed the burners. The prisoner fraudulently, by fixing a pipe connecting the entrance and exit-pipes, made a passage through which the gas rose to the burners without passing through the meter, which consequently did not show all the gas consumed. The jury found that the prisoner had not by contract any interest in or control over the gas until it passed the meter. It was held, that the prisoner, by opening the stop-cock of the connecting-pipe, and letting the gas from out of the entrance-pipe into it, sufficiently secured a portion of the gas to constitute an *asportavit*, and that he was guilty of larceny of the gas. *White's case*, 1 *Dears. C. C. R.* 203; *S. C.* 22; *L. J. M. C.* 123.

Proof of the felonious intent in the taking—goods obtained by false process of law.] Where the possession of goods is obtained from the owner by means of the fraudulent abuse of legal process, the offence will amount to larceny. Thus it is laid down by Lord Hale, that if A. has a design to steal the horse of B., and enters a plaint of replevin in the sheriff's court for the horse, and gets him delivered to him and rides him away, this is a taking and stealing, because done *in fraudem legis*. So where A., having a mind privately to get the goods of B. into his possession, brings an ejectment, and obtains judgment against the casual ejector, and thereby gets into possession, and takes the goods, if it be done *animo furandi*, it is larceny. 1 *Hale*, *P. C.* 507; 2 *East*, *P. C.* 660; 2 *Russ. by Grea.* 54.

Proof of the felonious intent in the taking—mistake.] The proof that the goods were taken with a felonious intent may be rebutted, by showing that the party charged with the larceny took them by mistake. Thus if the sheep of A. stray from his flock into that of B. and the latter by mistake drives them with his own flock, or shears them, that is not felony; but if he knows the sheep to be another's and marks them with his own mark, that would be evidence of a

felony. 1 *Hale, P. C.* 507. And where the prisoner by mistake drove away with his flock of sheep one of the prosecutor's lambs, and afterwards on finding out that he had the lamb, immediately sold it as his own: it was held, that as the original taking was not rightful, but was an act of trespass, the subsequent appropriation was a larceny. *Riley's case*, 1 *Dears. C. C. R.* 149; *S. C.* 22, *L. J. M. C.* 48. So if he appear desirous of concealing the property, or of preventing the inspection of it by the owner, or by any other who might make the discovery, or if, being asked, he deny the having them, although the knowledge be proved; these likewise are circumstances tending to show the felonious intent. 2 *East, P. C.* 661.

Proof of the felonious intent in the taking—goods taken by trespass.] Although the party may wrongfully take the goods, yet unless he intended to assume the property in them, and to convert them to his own use it will amount to a trespass only, and not to a felony. Thus if A. leaves his harrow in the field, and B. having land in the same field uses the harrow, and having done so, returns it to its place, or informs the owner, this is only a trespass. 1 *Hale, P. C.* 509. In the same manner if A. takes away the goods of B., openly before him or other persons, this carries with it evidence only of a trespass. *Ibid.* So of a servant riding his master's horse upon his own business. *Ibid.* The two prisoners were charged with stealing two horses. It appeared that they went in the night to an inn kept by the prosecutor, and took a horse and mare from his stable, and rode about thirty-three miles to a place, where they left them in the care of the ostler, stating that they should return. They were apprehended the same day, about fourteen miles from the place. The jury found the prisoners guilty, but added that they were of opinion they merely meant to ride the horses to this place, and to leave them there; but that they had no intention either of returning them, or making any further use of them. The judges, upon this finding (Grose, J., *diss*, and Lord Alvanley not giving any express opinion), held it to be a trespass only, and no larceny. They said there was no intent in the prisoners to change the property, or to make it their own, but only to use it for a special purpose, that is, to save their labour in travelling. The judges agreed that it was a question for the jury, and that if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. *Philipps's case*, 2 *East, P. C.* 662. So where, upon an indictment for stealing a horse, two saddles, &c., it appeared that the prisoner got into the prosecutor's stables, and took away the horse and the other articles all together; but that when he had got to some distance he turned the horse loose, and proceeded on foot, and attempted to sell the saddles; Garrow, B., left it to the jury to say, whether the prisoner had any intention of stealing the horse; for that if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and as it were, borrowed the horse for the purpose, he would not in point of law be guilty of larceny. *Crump's case*, 1 *C. & P.* 658. Upon the same principle the following case was decided. The prisoner was indicted for stealing a straw bonnet. It appeared that he entered the house where the bonnet was, through a window which had been left open, and took the bonnet, which belonged to a young girl whom he had seduced, and carried it to a hay-mow of his own, where he and the girl had been twice before. The jury thought that the prisoner's intent was to induce the girl to go again to the hay-mow, but that he did not mean to

deprive her of the bonnet. On a case reserved, the judges held that this taking was not felonious. *Dickinson's case, Russ. & Ry.* 420.

The prosecutor met the prisoner, whom he knew to be a poacher, and seized him. The prisoner, getting free, wrested a gun from the hands of the prosecutor, and ran away with it. It was proved that the next day the prisoner said he would sell the gun, and it was never found. Vaughan, B., told the jury, upon the trial of the prisoner for stealing the gun, that he might imagine that the prosecutor would use the gun so as to endanger his life, and if so, his taking it under that impression would not be felony; but if he took it, intending at the time to dispose of it, it would be felony. *Holloway's case,* 5 *C. & P.* 524. So where the prisoner took some skins of leather, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and get paid by his master for them; they having been dressed not by the prisoner, but by another workman, it was held not to be a larceny. *Holloway's case,* 1 *Den. C. C. R.* 381. But where a servant took his master's goods, and afterwards offered them for sale to him as the goods of another, he was held to be guilty of larceny. "In *Holloway's case,*" said Alderson, B., "the prisoner never intended to treat the goods as the property of any one but the real owner; here it is not so." *Hall's case,* 1 *Den. C. C. R.* 381; *S. C.* 18 *L. J. M. C.* 62. *Acc. Manning's case,* 1 *Dears. C. C. R.* 21; *S. C.* 22 *L. J. M. C.* 21.

Proof of the felonious intent in the taking—goods taken under a fair claim of right.] If there be any fair claim of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal. 2 *East, P. C.* 659. Thus where the owner of land takes a horse damage feasant, or a lord seizes it as an estray, though perhaps without title, yet these circumstances explain the intent, and show that it was not felonious; but these facts may be rebutted, as by showing that the horse was marked, in order to disguise him. 1 *Hale, P. C.* 506, 507; 2 *East, P. C.* 659. After a seizure of uncustomed goods, several persons broke, at night, into the house where they were deposited, with intent to retake them for the benefit of the former owner; and it was held that this design rebutted the presumption of a felonious intent. *Knight's case,* 2 *East, P. C.* 510, 659, *stated ante,* p. 352.

Whether the taking of corn by gleaners is to be considered as a trespass only, or whether it is to be regarded as a felony, must depend upon the circumstances of the particular case. In some places, a custom, authorising the practice of gleaning, is said to exist; in others, it is sanctioned by the permission of the tenant of the land; and even where no right whatever exists, yet if the party carry away the corn under a mistaken idea of right, the act would not amount to larceny, the felonious intent being absent. A conviction, however, is said to have taken place at the Old Bailey, upon an indictment for the exercise of this supposed right; but the circumstances of the case were not stated. 2 *Russ. by Grea.* 10. See *Price's case,* 4 *Burr.* 1925; 1 *H. Bl.* 51.

Proof of the felonious intent in the taking—goods procured by finding.] The law respecting the converting of goods found, to the finder's own use, depends upon the question of felonious intention. "If," says Lord Hale, "A. finds the purse of B. in the highway, and takes and carries it away, and the case has all the circumstances that prove it to

be done *animo furandi*, as denying or secreting it, yet it is not felony." 1 *Hale, P. C.* 506. "But," he adds, "where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretence of finding must not excuse." *Id.* The distinction, therefore, appears to be, that where the goods are found in such a situation that the owner may be presumed to have abandoned the property in them, the converting of them will not be a larceny; but if, from circumstances, the finder must infer that there has been no such abandonment, it will be felony to convert them without making due inquiry as to the owner. Thus it is said by Lord Hale, that if a man hides a purse of money in his corn-mow, and his servant, finding it, takes part of it: if, by circumstances, it appear that he knew his master laid it there, it is felony; but then the circumstances must be pregnant, otherwise it may be reasonably interpreted to be a bare finding, being an unusual place for such a *depositum*. 1 *Hale, P. C.* 507.

In the following cases, although, in strictness, the goods were acquired by finding, yet the converting of them was held to be larceny. A gentleman left a trunk in a hackney coach, and the coachman, taking it, converted it to his own use, this was held to be larceny; for the coachman must have known where he took the gentleman up, and where he set him down, and ought to have restored his trunk to him. *Lamb's case*, 2 *East, P. C.* 664. In a similar case, where a box had been left in a coach, and was found at the house of a Jew, where the coachman had uncorded it, and taken out several articles, some of which were missing; the coachman being indicted for larceny, the judge directed the jury that, if they thought that the prisoner had detained the box merely in the hope that a reward would be offered for it, and that he meant then to return it to the owner, they ought to acquit him; but if they thought that he had uncorded the box not merely from curiosity, but with an intention to embezzle any part of its contents, and that he had actually taken any of the goods mentioned in the indictment, it would be a matter of legal consideration, whether a person so guilty should not be reached as a felon. The jury having found the prisoner guilty; upon a case reserved, the verdict was approved of by the judges. *Wynne's case*, 1 *Leach*, 413; 2 *East, P. C.* 664, 697; and see *Sear's case*, 1 *Leach*, 415, (*n.*) The prosecutor having had his hat knocked off in a quarrel with a third person, the prisoner picked it up, and carried it home. Being indicted for larceny, Park, J., said, "If a person picks up a thing, and knows that he can immediately find the owner, but, instead of restoring it to the owner, converts it to his own use, this is felony." *Pope's case*, 6 *C. & P.* 346.

In the case of *Merry* v. *Green and Another* (which was an action of trespass for false imprisonment) a person purchased at a public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing several sovereigns. The contents of the bureau were not known to any one. The purchaser having appropriated the money to his own use, it was held that there was a taking which amounted to a trespass, and that he was guilty of larceny: it was held also, that a declaration by the auctioneer, that he sold all that the bureau contained with the article itself, would have given the purchaser a colourable right to the contents, in which case the abstraction of the money would not have been felonious. In the course of the argument in this case, one of the counsel asked "If the original possession is lawful, when is the felony committed?" Parke, B., interrupting him, said, "Why, suppose a person find a cheque in the street, and in the first

instance takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony; though he is a mere finder till he looks at it." In delivering the judgment of the court, the same learned baron said, "The old rule in *Coke's 3rd Inst.* 108, '*that if one lose his goods, and another find them, though he convert them, animo furandi, to his own use, is no larceny,*' has undergone in more recent times some limitation; one is, that if the finder knows who the owner of the lost chattel is, or if from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constituted a larceny. . . . It is said, that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, meant from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also, from *Wynne's case*, (*supra*), that if under the like circumstances, he acquire possession and mean to act honourably, but afterwards alter his mind, and *open* the parcel, with intent to embezzle its contents, such unlawful act would render him guilty of larceny." *Merry* v. *Green*, 7 *M. & W.* 623.

The whole law with reference to this subject was considered in the elaborate and learned judgment of Parke, B., in *Thurburn's case*, 1 *Den. C. C. R.* 387; *S. C.* 18 *L. J. M. C.* 140. The prisoner found a bank note, which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note, and the prisoner was convicted. But Parke, B., who tried the case, after conferring with Maule, J., was of opinion, that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and therefore declined to pass sentence, and reserved the case for the opinion of the Court of Criminal Appeal. That court held that the conviction was wrong. Parke, B., who delivered the unanimous judgment of the court, thus explains its grounds: "In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By the term *animo furandi*, is to be understood the intention to take, not a particular temporary, but an entire, dominion over the chattel, without a colour of right. As the rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him; and the crime of larceny cannot be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner." After commenting on the authorities, the learned Baron proceeds: "It is quite a mistake to suppose, as Mr. Greaves

has done (vol. ii. c. 14), that I meant in *Merry* v. *Green* to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked as well as marked property. It was meant to apply to the latter only. The result of these authorities is that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed, that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it, would not be a taking possession of the chattel. To apply these rules to the present case: The first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, and he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it, *animo furandi*, and the point to be decided is whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was dispunishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We therefore think that the conviction was wrong."

In a subsequent case, *R.* v. *Preston*, 2 *Den. C. C. R.* 353; *S. C.* 21 *L. J. M. C.* 41, also one of a lost bank note found by a person who appropriated it to his own use, it was decided that the jury are not to be directed to consider at what time the prisoner after taking it into his possession resolved to appropriate it to his own use, but whether, at the time he took possession of it, he knew, or had the means of knowing, who the owner was, and took possession of the

note with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate it to his own use, would amount to larceny.

Where the prisoner was indicted for stealing a watch, and the jury returned the following verdict, "We find the prisoner not guilty of stealing the watch, but guilty of keeping it in the hope of reward from the time he first had the watch," this was held to amount to a finding of not guilty. *Yorke's case*, 1 *Den. C. C. R.* 335; *S. C.* 18 *L. J. M. C.* 38. Where the jury found that the notes were lost, that the prisoner did not know the owner, but that it was probable that he could have traced him, it was held that the prisoner was not bound to do that, and that he had been wrongfully convicted of stealing the notes. *Dixon's case*, 25 *L. J. M. C.* 39.

As to what was lost property, was considered in *West's case*, 1 *Dears. C. C. R.* 402; *S. C.* 24 *L. J. M. C.* 4. A purse containing money was left by a purchaser on the prisoner's stall. A third person afterwards pointed out the purse to the prisoner, supposing it to be hers. She put it in her pocket, and afterwards concealed it; and on the return of the owner denied all knowledge of it. The jury found that the prisoner took up the purse knowing that it was not her own, and intending at the time to appropriate it to her own use, but that she did not know who was the owner at the time she took it. It was held, under these circumstances, that the purse was not lost property, and that the prisoner was properly convicted of larceny.

Proof of the felonious intent in the taking—goods taken by wife—or by wife and a stranger.] If a wife take goods of which the husband is the joint or sole owner, the taking is not larceny, because they are in law but one person, and the wife has a kind of interest in the goods. *Hawk. P. C. b.* 1, *c.* 33, *s.* 19. Therefore, where the wife of a member of a friendly society stole money belonging to the society, lodged in a box in her husband's custody, under the lock of the stewards of the society, it was held by the judges not to be larceny. *Willis's case*, 1 *Moody, C. C.* 375.

Whether, where a stranger and the wife jointly steal the husband's property, it is larceny in the stranger, has been the subject of contradictory decisions. *Clark's case*, *O. B.* 1818, 1 *Moo. C. C.* 376 (*n.*); *Tolfree's case*, 1 *Moody, C. C.* 243. In *R.* v. *Rosenberg*, 1 *C. & K.* 233, in reply to a remark from counsel, that there is a passage in *Dalton's Justice* as to the delivery of the husband's goods by the wife to the adulterer, constituting felony in him, Parke, B., said, "If that question arose, I should reserve it for the opinion of the judges." The point has been twice reserved for the opinion of the Court of Criminal Appeal. In *Thompson's case*, 1 *Den. C. C. R.* 549, the prisoner went away with the prosecutor's wife, and lived with her at Birmingham as man and wife; they took with them from the prosecutor's house several articles belonging to him, which were used in their house at Birmingham. The chairman of quarter sessions directed the jury to find the prisoner guilty, if they came to the conclusion either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods; or, secondly, that not being a party to the original taking or removal, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury found the prisoner guilty; adding, that they did so on the ground that there was a joint taking by the prisoner and the prose-

cutor's wife; and the court were unanimously of opinion that the conviction was right. In *Featherstone's case*, 1 *Dears. C. C. R.* 369; *S. C.* 23 *L. J. M. C.* 127, the prosecutor's wife had taken from his bed-room thirty-five sovereigns, and on leaving the house, called out to the prisoner, who was in a lower room of the house, "George, it is all right, come on." The prisoner left a few minutes afterwards, and he and the prosecutor's wife were traced to a public-house, where they passed the night together. When taken into custody, the prisoner had twenty-two sovereigns upon him. The jury found the prisoner guilty, stating, that they did so "on the ground that he received the sovereigns from the wife, and that she took them without the authority of her husband." The court held that the conviction was right. "The general rule," said Campbell, C. J., in giving judgment, "is that a wife cannot be convicted of larceny for stealing the goods of her husband. It is no larceny in her to carry away her husband's goods, as husband and wife are one. But the law has properly qualified that general rule, by saying, that if a wife commit adultery, and then steal the goods of her husband with the adulterer, she has determined her quality of wife, and is no longer looked upon as having any property in the goods, and the person who assists her is guilty of larceny. I think the case of the prisoner must be considered in the same light as if he had taken the goods himself. This is not the case of a receiving of the goods from the wife, but the prisoner is supposed actually to have assisted her in taking them. It is said in '*Russell on Crimes*,' 23, 'If the wife steal the goods of her husband and deliver them to B., who, knowing it, carries them away, B. being the adulterer of the wife, this, according to a very good opinion, would be felony in B., for in such case no consent of the husband can be presumed.' That is this very case. The prisoner was the adulterer of the wife, and knew that the goods were carried away without the consent of the husband. This case is within the express authority of the rule which is first laid down in '*Dalton*' c. 104, p. 268, and to be found in every book on the criminal law."

Proof of the taking—with reference to the possession of the goods.] It has been already stated (*ante*, p. 588), that in order to constitute larceny, there must be such a taking of the goods as would, without the felonious intent, amount to a trespass. Therefore, if the party obtain possession of the goods lawfully, as upon a trust, for or on account of the owner, by which he acquires a kind of special property in them, he cannot afterwards be guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest with intent to convert them to his own use, he thereby determine the privity of the bailment and the special property conferred upon him, in which case he is as much guilty of a trespass against the virtual possession of the owner, by such second taking, as if the act had been done by a mere stranger. 2 *East, P. C.* 554. The prisoner assigned his goods to trustees for the benefit of his creditors, but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury having found that the goods were not in the custody of the trustees, it was held that he was not guilty of larceny. *Pratt's case*, 1 *Dears. C. C. R.* 360. And see *John Smith's case*, *ante*, p. 575 (*a*).

Proof of the taking—with reference to the possession—original taking not felonious.] In cases, therefore, where the original taking of the goods is not *animo furandi*, a subsequent conversion of them to the party's own use will not constitute larceny. Upon an indictment for stealing, it appeared that the prosecutor's shop (containing the articles mentioned in the indictment) being on fire, his neighbours assisted in removing his goods for their security. The prisoner probably had removed all the articles which she was charged with stealing, when the prosecutor's other neighbours were thus employed. She removed some of the articles in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor applying to her next morning, she denied that she had any of the things belonging to him, but they were found concealed in her house. The jury found her guilty. but said, that in their opinion, when she first took the goods from the shop, she had no evil intention, but that such evil intention came upon her afterwards; and upon reference to the judges, they all held the conviction wrong, for if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust. *Leigh's case*, 2 *East, P. C.* 694; 1 *Leach*, 411 (*n*). This case is thus explained by Parke, B., in *Riley's case, ante*, p. 590: "In *Leigh's case*, the taking was with the consent of the owner; it was, therefore, the same thing as if the owner had entrusted the prisoner with the goods originally; and, if so, the subsequent appropriation could not be a larceny."

Where a letter containing a bill of exchange was by mistake delivered to another person of the same name as the person to whom it was addressed, and the person to whom it was so delivered converted the bill of exchange to his own use; being convicted of larceny for this act, a case was reserved for the opinion of the judges, who held the conviction wrong, on the ground that it did not appear that the prisoner had any *animus furandi*, when he first received the letter; and a pardon was recommended. *Mucklow's case*, 1 *Moody, C. C.* 160. So where J. S. by mistake received from the post-office a letter addressed to and intended for another person of the same name, and which contained a post-office order for money, and not being able to read, took the letter to W. D., who reading the letter to him, both became aware that the letter was not for J. D., but for another person; and, notwithstanding this, they got the order cashed, and appropriated the proceeds: it was held, on the authority of *Mucklow's case*, that they could not be convicted of larceny, there not appearing to have been any *animus furandi* at the time the letter was first received. *Davis's case*, 25 *L. J. M. C.* 91.

Proof of the taking—with reference to the possession—original taking not felonious—bailees.] The cases which most usually occur, illustrative of this doctrine, are those where goods have been delivered into the hands of a bailee for a special purpose, who thereby acquires a right to the possession, and who, if he converts them, while in his possession as bailee, to his own use, even *animo furandi*, as he is not guilty of a trespass, is not guilty of larceny by that act. Thus if goods are delivered to a carrier to be conveyed, and he steals them on the journey, it is no felony. 1 *Hale, P. C.* 504. So where a man delivered his watch to the prisoner to be repaired, who instead of repairing sold it, this was ruled to be no felony. *Levy's case*, 4 *C. & P.* 241. See also *Thistle's case*, 1 *Den. C. C. R.* 502. So where the prosecutor had delivered a horse to the prisoner, to be agisted at

1*s.* 6*d.* per week, and the latter, after keeping the animal for one week, for which he received payment, sold it in the course of the second week; the prisoner having been convicted of larceny, the judges held the conviction wrong. *Charles Smith's case*, 1 *Moo. C. C.* 474. The captain of a vessel having a number of casks of butter belonging to the prosecutor to carry on board his vessel, and having occasion to pay a debt contracted by him at a port in course of his voyage, gave an order to his mate to deliver thirteen casks of butter to his creditor, and the casks were delivered accordingly. Being indicted for larceny, Graham, B., before whom he was tried, thought that the severance of a part of the casks from the rest, and the formed design of doing so, took the case out of the authorities cited (1 *Hale, P. C.* 504; 2 *East, P. C.* 693), if they could be considered as applying to the case, and the prisoner was convicted; but upon a case reserved, the judges were of opinion that it was not larceny, and that the conviction was wrong. *Madox's case, Russ. & Ry.* 92. So where the prosecutor sent three trusses of hay consigned to a third person by the prisoner's cart, and the prisoner took away one of the trusses, which was found in his possession, but not broken up; Parke, J., held this to be no larceny, the truss not being broken up. *Pratley's case*, 5 *C. & P.* 533. So where goods were delivered by the prosecutor to the prisoners (who were not carriers, and employed by him on that occasion), to be conveyed by them, but they were to be paid for carrying them, and instead of taking them to the place directed, they stole the goods, but without opening any of the packages, it was ruled by Patteson, J., to be no felony. *Fletcher's case*, 4 *C. & P.* 545. Where A. allowed B. to take up a sovereign from the table of a beer-house, for the purpose of getting change, and B. never returned with the sovereign or the change, Coleridge, J., after consulting Gurney, B., held that there was no larceny of the sovereign; that the prosecutor, having given the sovereign to be taken away for change, had divested himself of the entire possession of it. *R.* v. *Thomas*, 9 *C. & P.* 741.

It is said by Lord Hale, that if A. delivers the key of his chamber to B., who unlocks the chamber, and takes the goods of A. *animo furandi*, this is felony, because the goods were not delivered to him, but taken by him. 1 *Hale, P. C.* 505. Upon this passage Mr. East remarks, that if the key be delivered for the purpose of intrusting the party with the care of the goods, it is as much a delivery of the goods themselves, as if each article had been put by the owner into the hands of the party; and then, although the taking of such goods out of the room with a fraudulent intent to convert them, might still be felony, yet it would be so on another ground, because by the act of taking the goods with such intent out of the room, where they were intended to remain for safe custody, the privity of contract would be determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. 2 *East, P. C.* 685. It may be doubted, however, whether the construction put upon the case by Mr. East, is not carrying the doctrine as to the determination of the special property further than the decided cases warrant.

In these cases it is always a question for the jury, whether, when the goods were taken, the prisoner had a felonious intent, for if he had, the act will amount to larceny. The prosecutor hired the prisoner at Bristol to drive fifty sheep for him to Bradford. The prisoner never took the sheep to Bradford, but sold ten of them on the way. The jury found the prisoner guilty, saying, they were of

opinion that at the time he received the sheep, he intended to convert them to his own use, and not to drive them to Bradford. On a case reserved, the judges were unanimously of opinion that the conviction was right. *Stock's case*, 1 *Moo. C. C.* 87. *Aliter* if he had not a felonious intent at the time he received them. *Hey's case*, 1 *Den. C. C. R.* 602. In that case a drover employed by the prosecutor to drive pigs, and paid the expenses of driving them, being paid wages by the day, but having the liberty to drive the cattle of any other person, at the end of his journey sold the pigs and converted the proceeds to his own use; this was held not to be larceny, as at the time he received the pigs into his custody he had no intention of appropriating them to his own use; and that he was merely a bailee and not a servant. In *Cornish's case*, 1 *Dears. C. C. R.* 425, the prisoner was a common carrier, and was employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard, and thence to another yard belonging to the prosecutor. The prisoner carted the coals to the first-mentioned coal-yard, and was engaged for several days in carting them from thence to the prosecutor's other yard. He left the first-mentioned coal-yard on one of these days with two carts and a waggon, all laden with coals; before he arrived at the other yard he delivered the two cart loads to a third person on his own account, but he duly delivered the waggon load at the prosecutor's other yard; it was held that there was no larceny, the goods having been delivered to the prisoner as a carrier, and there not having been any breaking of bulk or other determination of the bailment.

Proof of the taking—with reference to the possession—original taking not felonious—bailees—determination of the bailment.] Upon the principle that it is not felony in a bailee to convert to his own use the goods bailed to him, a nice distinction has been grafted, which seems, says Mr. East, to stand more upon positive law, which cannot now be questioned, than upon sound reasoning. 2 *East, P. C.* 695; but see *Mr. Starkie's observations*, 2 *Evid.* 448 (*n.*) 2*nd ed.* The distinction is thus stated by Lord Hale. If a man delivers goods to a carrier to carry to Dover, and he carries them away, it is no felony, but if the carrier have a bale or trunk with goods in it delivered to him, and he breaks the bale or trunk, and carries away the goods *animo furandi*, or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, it is a felonious taking. But that must be intended where he carries them to the place, and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking. 1 *Hale, P. C.* 504, 505.

This distinction has been recognised and acted upon in numerous cases, not only of carriers and other bailees, where the bailment has been determined by breaking bulk, &c., but likewise in the case of other persons, having a special property, where the contract conferring the special property has been terminated by the tortious act of the party. A farmer sent forty bags of wheat to the prisoner, who was a warehouseman, for safe custody. The prisoner took eight of the bags, and shooting the wheat out on the floor, mixed it with four bags of inferior wheat, and sold the whole twelve for his own benefit. He replaced the wheat thus taken from the prosecutor with inferior wheat of his own. It did not appear that there was any severing of part of the wheat in any one bag, from the residue of the wheat in the *same* bag. The prisoner being convicted of larceny, the judges

were unanimously of opinion that the conviction was right, that the taking of the whole of the wheat out of any one bag, was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the same bag. *Brazier's case, Russ. & Ry.* 337.

The prisoner was employed by a tailor to sell clothes for him about the county of L.; the price of each article was fixed, and the clothes were intrusted to the prisoner on the arrangement that he was to sell them at the price fixed, he receiving three shillings in the pound on the amount received for them, and being bound to bring back the remainder of the clothes which were unsold. The prisoner received from the prosecutor a parcel of clothes on these terms, but, instead of selling them, he fraudulently pawned a portion of them for his own benefit, and afterwards fraudulently misappropriated the residue to his own use. It was held that the original bailment of the goods to the prosecutor was determined by the unlawful act of pawning part of them, and that the subsequent fraudulent misappropriation of the remainder amounted to larceny. *Poyser's case*, 2 *Den. C. C. R.* 233; *S. C.* 20 *L. J. M. C* 191.

In order, therefore, to establish a larceny of goods which have been bailed, some act determining the bailment must be proved. A woman intrusted a porter to carry a bundle for her to Wapping, and went with him. In going to the place the porter ran away with the bundle, which was lost. Being indicted for felony, Holt, C. J., told the jury, that if they thought the porter opened the bundle and took out the goods, it was felony: and he thought that the fact as above stated was evidence of it. *Anon.* 2 *East, P. C.* 697; 1 *Leach*, 415, (*n.*) Upon this case Mr. East observes, with submission to so high an authority, it may be fairly doubted, whether there were sufficient evidence before the jury on this statement to warrant them in finding that the porter opened the bundle and took out the goods. A different ground for the determination, he continues, is suggested in another MS. (2 *MS. Sum.* 233,) *viz.* that all the circumstances of the case showed that the porter took the bundle at first, with an intent to steal it. 2 *East, P. C.* 697. Where A. asked the prisoner, who was not her servant, but only a casual acquaintance, to put a letter in the post, telling her it contained money, and the prisoner broke the seal and abstracted the money before she put it in the post; Mirehouse, C. S., after consulting Gaselee, J., held that she was guilty of larceny. *Mary Jones's case*, 7 *C. & P.* 151. So where the prosecutor gave the prisoner, who was not his servant, a parcel to take to a coach-office, and the prisoner broke open the parcel and abstracted several notes from it before he delivered it. Gurney, B., with the assent of Bosanquet, J., who was present, held this to be larceny. *R.* v. *Jenkins*, 9 *C. & P.* 38. The prisoner, who was the owner of a boat, was employed by the prosecutor, the captain of a ship, to carry a number of wooden staves ashore in his boat. The prosecutor's men were put into the boat, but were under the control of the prisoner, who did not deliver all the staves, but took one of them away to the house of his mother. Patteson, J., held that this was a bailment, and not a charge, the prosecutor's servant being under the prisoner's control, and that a mere non-delivery of the staves would not have been a larceny; but that if the prisoner separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to

his own use, that was equivalent to a breaking of bulk, and would be sufficient to constitute a larceny. The learned judge left it to the jury to say, whether the prisoner removed the stave to his mother's with intent to convert it to his own use. The prisoner was acquitted. *Howell's case*, 7 *C. & P.* 325.

Although a contrary opinion appears to have been formerly entertained (see *Charlewood's case*, 1 *Leach*, 409; 2 *East*, *P. C.* 689, *post*, p. 608), yet it is now settled, that when the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, the subsequent withholding and disposing of them will not constitute a new felonious taking, nor make him guilty of felony. *Bank's case*, *Russ. & Ry.* 441. In order to make the bailee guilty of felony, the mere countermand of the bailment is not sufficient; there must also be a resumption of possession by the bailor. *Stear's case*, 1 *Den. C. C. R.* 349. "If there had been merely a countermand," said Parke, B., in that case, "and no resumption of possession, there could have been no larceny; because (as was suggested in argument by V. Williams, J.) trespass would not have lain, but only trover; and to support an indictment for larceny, the prosecutor must have such possession as would entitle him to bring trespass; which he could not have, unless the bailment were determined.

Proof of the taking—with reference to the possession of the goods—cases of servants.] Where a person has the bare charge or custody of goods, the legal possession of such goods remains in the owner, and larceny may be committed by the person having such a bare possession or custody. He that has the care of another's goods, says Lord Hale, has not the possession of them, and therefore may, by his felonious embezzling of them, be guilty of felony; as the butler who has the charge of his master's plate, the shepherd who has the charge of his master's sheep; and so it is of an apprentice that feloniously embezzles his master's goods. 1 *Hale*, 506; 2 *East*, *P. C.* 554. So where a carter goes away with his master's cart. *Robinson's case*, 2 *East*, *P. C.* 565. Thus where the prisoner was sent with his master's cart for some coals which were delivered to him, and deposited in the cart, and the price charged to his master's account, and on the road home the prisoner disposed of a portion of the coals, it was held that this case was a larceny of the goods, and not embezzlement, they being constructively in the possession of the master when they were deposited in the cart. *Reid's case*, 1 *Dears. C. C. R.* 257; *S. C.* 23 *L. J. M. C.* 25. The prisoner was a drover, and had been employed by the prosecutor as such, off and on, for nearly five years. Being employed by him to drive a number of sheep to a fair, he sold several of them, and applied the money to his own purposes. He was found guilty of larceny; but the jury also found that he did not intend to steal the sheep at the time he took them into his possession. On a case reserved, the judges who met were of opinion, that as the owner parted with the custody only, and not with the possession, the prisoner's possession was the owner's, and that the conviction was right. *R.* v. *M'Namee*, 1 *Moo. C. C.* 368. *Aliter* if the evidence show that the drover was not the servant of the prosecutor. *Hey's case*, 1 *Den. C. C. R.* 602, *ante*, p. 587. In this case, Parke, B., in delivering the judgment of the court, said, "after

the full consideration which this subject has undergone, we doubt whether the case of *R.* v. *M'Namee* would be now decided in the same way." The prisoner was employed by the prosecutor as his foreman and book-keeper, but did not live in his house. The prosecutor delivered a bill of exchange to him, with orders to take it to the post, that it might be transmitted to London. The prisoner got cash for the bill, with which he absconded. It was objected that by the delivery the prosecutor had parted with the possession of the bill, and the case was likened to that of a carrier intrusted with goods; but the judges held it larceny, on the principle that the possession still remained in the master. *Paradice's case*, 2 *East, P. C.* 565, cited 1 *Leach*, 523, 524. The prisoner was employed as a porter by the prosecutor, who delivered to him a parcel to carry to a customer. While carrying it he met two men, who persuaded him to dispose of the goods, which he did, taking them out of the parcel and receiving part of the money. All the judges held this to be larceny, as the possession still remained in the master. *Bass's case*, 2 *East, P. C.* 566; 1 *Leach*, 251, 523.

So where the prosecutor delivered to his servant a sum of money to carry to a person, who was to give him a bill for it, and the servant appropriated it to his own use, the judges were of opinion that this was not a mere breach of trust, but a felony. *Lavender's case*, 1793, *twice considered by the judges*, 2 *East, P. C.* 566; 2 *Russ. by Grea.* 160; see also *R.* v. *Heath*, 2 *Moo. C. C.* 33. A. employed B. to take his barge from one particular place to another, and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge 16 miles, and paid tonnage dues to an amount rather under 2*l.* and appropriated the remaining sovereign to his own use. Patteson, J., held this to be a larceny. *Goode's case, Carr & M.* 582. See also *Beaman's case, Carr & M.* 595. Where the servant of the prosecutor went to her master's wife, and told her she was acquainted with a person who could give her ten guineas' worth of silver, and the prosecutor's wife gave her ten guineas for that purpose, which she ran away with, she was found guilty of the larceny. *Atkinson's case*, 1 *Leach*, 302 (*n*); 2 *Russ. by Grea.* 161. So where the clerk of a banker told a customer of the house that he had paid in money to his account, and thereby induced the customer to give him a cheque to the amount, for which the prisoner took bank-notes out of the drawer, and afterwards made fictitious entries in the books to prevent a discovery of the transaction; it was held, on a case reserved for the opinion of the judges, that this was a felonious taking of the bank-notes from the drawer, and not an obtaining of them under a false pretence. *Hammon's case*, 2 *Leach*, 1083; 4 *Taunt.* 304; *Russ & Ry.* 221; 2 *Russ. by Grea.* 163. See *White's case*, 9 *C. & P.* 344, *ante*, p. 587; also *Hornby's case*, 1 *C. & K.* 305, *post*, 605.

The prisoner being the prosecutor's servant, it was his duty to receive and pay monies for the prosecutor, and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time. On one occasion the prisoner showed a balance of 2*l.* in his favour, by taking credit for payments falsely entered in his book as having been made by him, when in fact they had not been made by him, and thereupon was paid by his master the 2*l.* as a balance due to him. The prisoner having been convicted of larceny, the Court of Criminal Appeal held the conviction wrong. *Green's case*, 1 *Dears. C. C. R.* 323.

Where a clerk or servant takes a bill of exchange belonging to his master, gets it discounted, and converts the proceeds to his own use, this is a larceny of the bill, though the clerk have authority to discount bills. In a case of this kind it was contended, on behalf of the prisoner, that the bill having come legally into his possession, like any other bill of the prosecutor's, over which he had a disposing power, he had a right to receive, though not to convert the money to his own use, which was, however, only a breach of trust. But Heath, J., was clearly of opinion that it was felony, the bill having been once decidedly in the possession of the prosecutor, by the clerk who got it accepted putting it amongst the other bills, in the prosecutor's desk, and the prisoner having feloniously taken it away out of that possession. *Chipchase's case*, 2 *East*, *P. C.* 567; 2 *Leach*, 699; 2 *Russ. by Grea.* 162.

G. and others were the directors of an Assurance Company, managed the affairs of the company, appointed, paid, controlled, and dismissed the clerks and other servants, and had the charge and custody of all the books and papers of the company. The company had a drawing account with Glyn & Co., and used to send their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned together with the cheques, &c., of the preceding week. The prisoner was a salaried clerk in the office of the company; it was his duty to receive the pass-book and vouchers from the messenger, and to preserve the vouchers for the use of the company. On the 27th February, Glyn & Co. delivered the company's pass-book, containing, amongst other things, a certain cashed cheque, for 1400*l.*, to the messenger of the company, who delivered the book and cheque to the prisoner in the usual way, and he thereupon fraudulently destroyed it. It was held that the prisoner had been rightly convicted of larceny as a servant, inasmuch as the cheque, when delivered into his custody in the usual course of business, was constructively in the possession of the directors, who, under the circumstances, were his masters. *Watt's case*, 2 *Den. C. C. R.* 14; *S. C.* 19 *L. J. M. C.* 193; *Manny's case*, 1 *Moo. C. C.* 276, and *Masters's case*, 1 *Den. C. C. R.* 332, applied and distinguished the one from the other.

In order to render the offence larceny, where the property is taken by a servant, it must appear that the goods were at the time in the possession of the master. It is not, however, necessary, that they should be in his *actual* possession, it is sufficient if he has a constructive possession, or possession in law. Therefore, where a man purchases goods, and sends his servant to receive them, and the servant carries them away, it is larceny, for the property carries with it the possession in law. On the other hand, unless the possession of the goods, actual or constructive, be in the prosecutor, no larceny can be committed upon them with regard to him. This distinction is very material, as drawing the line between larceny and embezzlement. Now, however, by 14 & 15 Vict. c. 100, s. 13, any person indicted for embezzlement as a clerk, &c., is not to be acquitted if the offence turn out to be larceny, and *vice versâ*. In the following cases, the possession was decided to be in the prosecutor, and the offence to be larceny.

The prisoner was ordered by his masters, the prosecutors, to go with their barge to one Wilson, a corn-meter, for as much corn as the barge would carry, and which was to be brought in loose bulk. The prisoner received 230 quarters in loose bulk, and five other

quarters, which he ordered to be put in sacks, and afterwards embezzled. The question reserved for the opinion of the judges was, whether this was felony, the oats never having been in the possession of the prosecutors, or whether it was not like the case of a servant receiving charge of, or buying a thing for his master, but never delivering it; but they held that this was larceny in the servant, for it was a taking from the actual possession of the owner as much as if the oats had been in his granary. *Spears's case*, 2 *East*, *P. C.* 568; 2 *Leach*, 826; 2 *Russ. by Grea.* 155. In a similar case, where the prisoner, a servant of the prosecutors, came alongside a vessel in which there was a quantity of corn which had been purchased by the prosecutors, and procured a portion to be put into sacks, which he carried away and sold, never having been employed to sell corn by his masters; on a case reserved, the judges held this to be larceny. The property of the prosecutors in the corn, observes Mr. East, was complete before the delivery to the prisoner, and after the purchase of it in the vessel, they had a lawful and exclusive possession of it against all the world, but the owner of the vessel. *Abrahat's case*, 2 *East*, *P. C.* 569; 2 *Leach*, 824; 2 *Russ. by Grea.* 156. See also *Reid's case*, *ante*, p. 589 *a*. So where a servant, sent to fetch away goods purchased and lying at the London Docks, purloined them. *Harding's case*, *Russ. & Ry.* 125; 2 *Russ. by Grea.* 156. These authorities were considered and supported in *Johnson's case*, 2 *Den. C. C. R.* 310; *S. C.* 21 *L. J. M. C.* 32. There, two men, acting in concert, and intending to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a cheque on his bank for 42*l.* payable in the name of J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of forty-two sovereigns, and that W. was to remain at the shop till J. and the prosecutor went to and returned from the bank. At the bank, by desire of the prosecutor, the banker handed four ten pound notes and two sovereigns to J. in the presence of the prosecutor, who then left the bank together. On their way back to the shop, J. went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes and the two sovereigns, which he and W., who in the meanwhile had gone away from the shop with the forty-two sovereigns, appropriated to their own use. It was held that the misappropriation of the notes and the two sovereigns was larceny, the prosecutor never having parted with the property and possession in them, and J. having had no more than the bare custody of the money which he carried off.

A. had agreed to buy straw of B., and sent his servant C. to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a courtyard of A., and then went to A. and asked him to send some one with the key of the hayloft, which was over the stable, which A. did, and C. put part of the straw into the hayloft, and carried the rest away to a public house and sold it. Tindal, C. J., held that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable door. *R.* v. *Hayward*, 1 *C. & K.* 518.

If the goods are not in the actual or constructive possession of the master at the time they are taken, the offence of the servant in taking them will be embezzlement, and not larceny. Therefore, where goods in the possession of a third person, and not yet delivered

over to the master, are delivered to the servant, who appropriates them to his own use, this is not a larceny, for the time of the larceny must be referred to the period of the receipt of the goods by the servant, at which time there was no possession in the master, without which there could be no trespass, and no larceny. *Vide ante*, p. 575. If, says Mr. East, the master had no otherwise the possession of the goods than by the bare receipt of his servant, upon the delivery of another for the master's use, and the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like; although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting the goods to his own use; because as to him there was no tortious taking in the first instance, and consequently no trespass, as there is where a servant converts to his own use property in the virtual possession of his master. 2 *East*, *P. C.* 568.

The prisoner, a cashier at the bank of England, was indicted for stealing certain India bonds, laid as the property of the bank in one count, and in another, of a person unknown. The bonds were paid into the bank by order of the court of Chancery, and according to the course of business, ought to have been deposited in a chest in the cellars. The prisoner, who received them from the court of Chancery, put them in his own desk, and afterwards sold them. The court before which the prisoner was tried, was of opinion, that this was not felony; that the possession of the bonds was always in the prisoner, and that the bank had no possession which was not his possession, until the bonds were deposited in the cellars as usual; and one of the judges took the distinction between a possession sufficient to maintain a civil action, and a possession whereon to found a criminal prosecution. *Waite's case*, 2 *East*, *P. C.* 570. Money, in cash and bank-notes, was paid into a bank to a clerk there, whose duty it was to receive and give discharges for money, and to place the bank-notes in a drawer; he gave an acknowledgment for the sum in question, but kept back a 100*l.* bank-note, and never put it in the drawer. On a case reserved, some doubt was at first entertained amongst the judges, but at last, all assembled agreed that this was no felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner, though it would have been otherwise, if the prisoner had deposited it in the drawer, and had afterwards taken it. They thought that this was not to be distinguished from the cases of *Waite, supra, and Bull, infra*, which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner, and here it was delivered into the possession of the prisoner. They said, that though to many purposes the note was in the possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached, for it was a lawful one. Eyre, C. J., also observed that the cases ran into one another very much, and were hardly to be distinguished; and that in *Spears's case*, the corn was in the possession of the master, under the care of the servant. *Bazeley's case*, 2 *East*, *P. C.* 571; 2 *Leach*, 835; 2 *Russ. by Grea.* 164. In consequence of this case, the statute 39 Geo. 3, c. 85 (now repealed by 7 & 8 Geo. 4. c. 29), against embezzlements by clerks and servants, was passed. 2 *Leach*, 849. The prosecutor suspecting that he was robbed by the prisoner, his servant, who attended the

shop, employed a customer to come to his shop on pretence of purchasing, and gave him some marked silver of his own, with which the customer came to the shop in the absence of the owner, and bought goods of the prisoner. Soon after, the master coming in, examined the till, in which the prisoner ought to have deposited the money when received, and not finding it there, procured him to be arrested, and on search, the marked money was found upon him. On a case reserved, the judges were of opinion that the prisoner was not guilty of felony, but only of a breach of trust, the money never having been put into the till; and, therefore, not having been in the possession of the master, as against the defendant. *Bull's case, cited in Bazeley's case*, 2 *East, P. C.* 572; 2 *Leach*, 841; 2 *Russ. by Grea.* 163. So where a servant was sent by his master to get change of a 5*l.* note, which he did, saying it was for his master, but never returned, being convicted of stealing the change, the judges, on a case reserved, held this to be no larceny, because the master never had possession of the change except by the hands of the prisoner. *Sullen's case*, 1 *Moody, C. C.* 129. So where A. owed the prosecutor 5*l.*, and paid it to the prisoner, who was the prosecutor's servant, supposing him authorised to receive it, which he was not, and the prisoner never accounted for the money to his master; Alderson, B., held that this was neither embezzlement nor larceny. *Hawtin's case*, 7 *C. & P.* 281. See *Wilson's case*, 9 *C. & P.* 27, where the offence charged was held to be larceny.

The punishment of larceny, when committed by clerks and servants, is regulated by the 7 & 8 Geo. 4, c. 29, s. 46, which enacts for the punishment of depredations committed by clerks and servants, "that if any clerk or servant shall steal any chattel, money, or valuable security, belonging to, or in the possession or power of his master, every such offender being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."

The driver of a glass coach hired for the day was held by Patteson, J., and Gurney, B., not to be the servant of the party hiring it, so as to bring him within the foregoing section. *Haydon's case*, 7 *C. & P.* 445. And where on the trial of an indictment for larceny as a servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as the nurse to his sick daughter, having board and lodging and occasional presents for her services, but no wages; and while the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept and brought back a forged receipt to the coal bill; Coleridge, J., held that the prisoner was not the servant of the prosecutor, but that it was a larceny of the money. *Frances Smith's case*, 1 *C. & K.* 423. In a case before Coleridge, J., that learned judge expressed great doubt whether the above enactment was meant to include a larceny by a clerk in a public office under the crown, but it was unnecessary to decide the point, as the indictment contained counts for embezzlement under the 2 Wm. 4, c. 4, on which the prisoner was convicted. *Lovell's case*, 2 *Moo. & R.* 236.

Proof of the taking—with reference to the possession—cases of lodgers.] It was for some time considered a doubtful point whether

the taking of goods by a lodger was larceny at common law, on the ground, that, like a bailee, he had the possession of the goods, but at last it was held, that it was not larceny. *Meere's case*, 1 *Shower*, 50; 2 *Russ. by Grea.* 226. Upon this decision Mr. East observes, that if it clearly appears that the prisoner took the lodgings with the intent to gain a better opportunity of rifling them, and to elude the law, there seems to be no reason why it should not be felony at common law. 2 *East, P. C.* 585. To remedy this state of the law, the statute 3 & 4 Wm. and M. c. 9, was passed, making the offence larceny.

That act being repealed by the 7 & 8 Geo. 4, c. 27, it is by the 7 & 8 Geo. 4, c. 29, s. 45, (the 9 Geo. 4, c. 55, I.), enacted for the punishment of depredations committed by tenants and lodgers, "that if any person shall steal any chattel or fixture let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

Under the repealed statute, it was held that where the whole house, ready furnished, was let to the prisoner, it was not a case within the statute, which was meant to apply to cases where the owner had a possession, and the lodger the use. *Palmer's case*, 2 *East, P. C.* 586. But such a case is within the provisions of the new statute, which applies to *houses* and *tenants*. Under the former statute also, it was held that it was no objection to state that the lodgings were let by the *wife* of the owner, for that the contract might be stated, according either to the fact or the legal operation; and it seems to have been thought unnecessary to state *by whom* the lodgings were let, and that if there was a mistake in the name of that party, the allegation might be rejected as surplusage. *Healy's case*, 1 *Moody, C. C.* 1.

Proof of the taking—with reference to the possession—stealing from the person.] The stealing from the person without violence, or putting in fear, was provided against by the statute 48 Geo. 3, c. 129, s. 2, (now repealed); by which it was enacted, that any person who should feloniously steal, take, and carry away any money, goods, or chattels, from the person of any other, whether privily, without his knowledge, or not, but without such fear, or putting in fear, as is sufficient to constitute the crime of robbery, should be liable, &c.

In a case upon this statute, it was held that the indictment need not negative the force or fear, and that, although such force and fear did in fact exist, the prisoner might be convicted under this act. *Pearce's case, Russ. & Ry.* 174; 2 *Leach*, 1046. And the same point was held in a subsequent case. *Robinson's case, Russ. & Ry.* 321.

The above statute was repealed by the 7 & 8 Geo. 4, c. 27, and it was enacted by the 7 & 8 Geo. 4, c. 29, s. 6 (the 9 Geo. 4, c. 55, I.) that if any person shall steal any such property [viz. any chattel, money, or valuable security,] from the person of another, every such offender should be guilty of felony, and, being convicted thereof,

should be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court should so think fit,) in addition to such imprisonment.

By the 7 Wm. 4 and 1 Vict. c. 87, s. 1, (E. & I.) so much of the above act as is hereinafter referred to, and so much of the same act as relates to the punishment of principals in the second degree, and of accessaries before and after the fact respectively, is repealed, except as to offences committed before or upon the 30th of September, 1837.

By s. 5, "whosoever shall steal any property (which word by s. 12, shall denote every thing included under the words 'chattel, money, or valuable security,' used in the 7 & 8 Geo. 4, c. 29,) from the person of another, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or be imprisoned for any term not exceeding three years."

By s. 10, "where any person shall be convicted of any offences punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

To support a prosecution for stealing from the person, the prosecutor must prove, 1, the taking, 2, of the goods, &c., and 3, from the person. The taking, and the nature of the goods taken, will be proved as in other cases of larceny.

The taking from the person, to constitute this offence, may be either with or without the knowledge of the owner; but the property must be completely removed from the person. The following evidence was held not to be sufficient. The prosecutor said, "I felt a pressure of two persons, one on each side of me; I had secured my book in an inside pocket of my coat; I felt a hand between my coat and waistcoat. I was satisfied the prisoner was attempting to get my book out. The other person had hold of my right arm, and I forced it from him, and thrust it down to my book; in doing which I brushed the prisoner's hand and arm. The book was just lifted out of my pocket; it returned into my pocket. It was out, how far I cannot tell; I saw a slight glance of a man's hand down from my breast; I secured the prisoner after a severe struggle." On cross-examination, the prosecutor said, "I am satisfied the book was drawn from my pocket; it was an inch above the top of the pocket." The prisoner being convicted, on a case reserved, six of the judges thought that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of their lordships were of a contrary opinion; but the judges were unanimously of opinion that the simple larceny was complete. *Thompson's case*, 1 *Moo. C. C.* 78. In *Simpson's case*, 1 *Dears. C. C. R.* 421; *S. C.* 24 *L. J. M. C.* 7, the prosecutor carried his watch in a waistcoat-pocket, with a chain attached passing through a button-hole of the waistcoat, being there secured by a watch-key. The prisoner took the watch out of the pocket and by force drew the

chain out of the button-hole, but the watch-key having been caught in a button of the waistcoat, the watch and chain remained suspended. It was held there was a sufficient severance to maintain a conviction for stealing from the person. Jervis, C. J., in giving judgment, said, "It is unnecessary to pronounce any opinion on *Thompson's case.* There seems to be some confusion in the use of the expression, 'about the person;' here the watch was temporarily and for one moment in the possession of the prisoner."

Proof of the taking—distinction between larceny and obtaining goods, &c. by false pretences.] Although the distinction between larceny and the obtaining of goods, &c. by false pretences, is not so material, since the statute 7 & 8 Geo. 4, c. 29, s. 53, which provides, that where a person is indicted for the misdemeanor, and it appears that he obtained the property in such a manner as to amount to larceny, he shall not, by reason thereof, be acquitted, see *ante*, p. 448. yet as the converse is not the case, it is material to inquire what circumstances will be held to constitute the respective offences.

As the character of the transaction depends upon the intention of the parties, that intention must determine the nature of the offence. It is not however sufficient to show simply a felonious intent, an *animus furandi* on the part of the offender; although such would seem to have been the opinion of Ashurst, J., who says, "Wherever there is a real and *bonâ fide* contract and delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bonâ fide* contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony." *Pear's case*, 2 *East, P. C.* 688 (*n*). It will be seen, however, by the cases about to be cited, that the mere intent to commit felony, or rather fraudulently to appropriate the matter in question to the party's own use, is not sufficient to render the taking felonious, where the owner, although induced by the false representations of the offender, intends to part with his property in the matter delivered. The law of Scotland is the same as our own on this point; and the principle of distinction, between larceny and false pretences, is well expressed in the following passage from a writer on the criminal law of that country. "Where possession is obtained by such false representations as induce the owner to sell or part with *the property*, the crime is swindling. But a variety of cases frequently occur, in which possession is obtained, not on any contract or agreement adequate to pass the property, but on some inferior title, adequate to give the prisoner the right of *interim* custody. The distinction between such cases, and those in which the property is obtained on a false pretence, lies here—that in the one case, the proprietor has agreed to transfer the property, and therefore he has only been imposed upon in the transaction; and the other, he has never agreed to part with his property, and therefore the subsequent appropriation is theft." *Alison's Prin.. Crim. Law of Scotl.* 259.

To prevent the case from amounting to larceny, the delivery of the goods must be by some person having authority, by such delivery, to pass the property. Therefore, where the prisoner procured a parcel from the servant of a carrier, by falsely pretending that he was the person to whom it was addressed, and being indicted for larceny, the jury found, that when the prisoner obtained the goods he knew they were not his own property, and intended to steal them; the judges,

on a case reserved, held that the conviction of the prisoner for larceny was right, on the ground that the ownership of the goods was not parted with, the carrier's servant having no authority to part with the ownership to the prisoner, and the taking was therefore larceny. *Longstreeth's case*, 1 *Moody*, *C. C.* 137; see *Jackson's case*, *Id.* 119; *post*, 618; *Wilkins's case*, 2 *East*, *P. C.* 673. Wheat in the possession of the prosecutors as bailees, was placed in one of their storehouses in the care of a servant E., who was to deliver the wheat only to the order of the prosecutors or their managing clerk C. The prisoner, who was in their employ, obtained the key of the storehouse from E., and was allowed to remove a quantity of the wheat, upon his representation to E. that he had been sent by C., and was to take the wheat to a railway station. This representation was false; and he subsequently disposed of the wheat. It was contended upon these facts, that the wheat was obtained by false pretences, but the court held, that he had been properly convicted of larceny. *Robins's case*, 1 *Dears. C. C. R.* 418.

Obtaining goods by means of a forged order has been held by the judges not to be larceny. *R.* v. *Adams*, 1 *Den. C. C.* 38.

Proof of the taking—no intent to part with property by the prosecutor—original felonious intent on the part of the prisoner—cases of hiring horses, &c.—larceny.] In the following case, the owner of the goods having no intention of parting with the property in them, and the offender having, at the time of obtaining them, the *animus furandi*, the circumstances were held to constitute a felony. The prisoner hired a mare for a day from the prosecutor in London, in order to go to Sutton, in Surrey, and said he should return the same evening. The prisoner gave the prosecutor a false reference. On the afternoon of the day on which he hired the mare, the prisoner sold her in Smithfield. The jury found the prisoner guilty of stealing the mare, and a case was reserved for the opinion of the judges, which underwent great discussion. Two of their lordships thought, that as the mare was obtained from the owner by means of asserting that which was false, *viz.*, that the prisoner wanted to go a journey which he never intended to take, and as the statutes 33 Hen. 8, and 30 Geo. 2, had made the offence of obtaining goods by false tokens, or false pretences, punishable as a misdemeanor only, and the 33 Hen. 8, had distinguished the case of obtaining goods by false tokens from obtaining goods by stealth, they were bound by those statutes to say that the prisoner's offence was not felony. A majority of their lordships, however, held that this case did not come within the statutes 33 Hen. 8 & 30 Geo. 2, relating to false pretences, which were not intended to mitigate the common law, or to make that a less offence which was a greater one before. They held, that where an original felonious intent appeared, those statutes did not apply. They said, that if no such intent appeared, if the means mentioned in the statutes were made use of, the legislature had made the offender answerable criminally, who before, by the common law of the land, was only answerable civilly. *Pear's case*, 2 *East*, *P. C.* 685; 1 *Leach*, 212. It will be observed, that, in this case, the prosecutor did not intend to part with the *property* in the horse, and no question arose upon that point.

The following case, under similar circumstances, was decided the same way. The prisoner, a post-boy, applied to the prosecutor, a livery stable-keeper, for a horse, in the name of a Mr. Ely, saying

that there was a chaise going to Barnet, and that Mr. Ely wanted a horse for his servant to accompany the chaise, and return with it. The horse was delivered by the prosecutor's servant to the prisoner, who mounted him, and, on leaving the yard, said he was going no further than Barnet. He only proceeded a short way on the road to Barnet, and on the same day sold the horse in Goodman's-fields for a guinea and a half, including saddle and bridle. The horse was much injured, and appeared to have been ridden very hard. The purchaser sold the horse for 2*l.* 15*s.* The court observed, that the judges, in *Pear's case*, had determined, that if a person, at the time he obtained another's property, meant to convert it to his own use, it was felony. That there was a distinction, however, to be observed in this case, though it was so nice that it might not be obvious to common understandings; for if they thought that the prisoner, at the time of hiring the horse for the purpose of going to Barnet, really intended to go there, but, finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of proceeding to the place, it would not amount to a felonious taking. That there was yet another point for their consideration; for though the prisoner really went to Barnet, yet, being obliged by the contract to re-deliver the horse to the owner on his return, if they thought that he did perform the journey, and that after his return, instead of re-delivering it to the owner, converted it to his own use, he would thereby be guilty of felony, for the end and purpose of the journey was then over. The jury found the prisoner guilty on the first ground, and he was executed. *Charlewood's case*, 2 *East*, *P. C.* 689; 1 *Leach*, 409. Major Semple's case was also decided upon the point of the prisoner's intention. Under the name of Major Harrold, he had been in the habit of hiring carriages from the prosecutor, a coachmaker, and on the 1st of Sept. 1786, he hired the chaise in question, saying, he should want it for three weeks or a month, as he was going a tour round the north. It was agreed that he should pay at the rate of 5*s.* a day during that time, and a price of fifty guineas was talked about, in case he should purchase it on his return to London, which was suggested by the prisoner, but no agreement took place as to the purchase. A few days afterwards the prisoner took the chaise with his own horses from London to Uxbridge, where he ordered a pair of horses, went to Bulstrode, returned to Uxbridge, and got fresh horses. Where he afterwards went did not appear. He was apprehended a year afterwards on another charge. Being indicted for stealing the chaise, it was argued for him, that he had obtained the chaise under a contract which was not proved to be broken, and that this distinguished it from *Pear's case* (*ante*, p. 597), and *Aickles' case*, (*post*, p. 601), that the chaise was hired generally, and not to go to any particular place; that he had therefore a legal possession, and that the act was a tortious conversion, and not a felony. It was also argued, that there was no evidence of a tortious conversion; for *non constat*, that the prisoner had disposed of the chaise. The court, however, said, that it was now settled, that the question of intention was for the jury, and if they were satisfied that the original taking of the chaise was with a felonious intent, and the hiring a mere pretence, to give effect to that design, without intention to restore or pay for it, it would fall precisely within *Pear's case*, and the other decisions, and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that

qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it; but if there were a *bonâ fide* hiring, and a real intention of returning it, at the time, the subsequent conversion of it would not be felony; for by the contract *and delivery*, the prisoner would have obtained the lawful possession of the chaise, and his subsequent abuse of the trust would not be felony. The court also held that there was sufficient presumptive evidence of a conversion, and the prisoner was found guilty. *Semple's case, O. B. Cor. Gould, J., and Adair, Serj., Rec.*, 2 *East, P. C.* 691; 1 *Leach*, 420.

It will be observed, that in this case the judges adverted to the fact, that the prosecutor only intended to give a qualified possession, a distinction which will be afterwards fully noticed.

The doctrine at the conclusion of *Charlewood's case, ante*, p. 599, that if the prisoner on his return to London, instead of restoring the horse to the owner, had converted it to his own use, he would have been guilty of a felony, has since been overruled. The prisoner borrowed a horse, under pretence of carrying a child to a neighbouring surgeon. Whether he carried the child thither did not appear; but the day following he took the horse in a different direction and sold it. The prisoner did not offer the horse to sale, but was applied to to sell it, so that it was possible that he might have had no felonious intention till that application was made. The jury thought that the prisoner had no felonious intention when he took the horse, but the learned judge thought, that as it had been borrowed for a special purpose, and that purpose was over when the prisoner took the horse to the place where he sold it, it was proper to submit the point to the consideration of the judges, who, after consideration, were of opinion that the doctrine laid down on the subject in 2 *East, P. C.* 690, and 2 *Russ.* 1089 and 1090 (1*st ed.*), was not correct. They held, that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it, did not constitute a new felonious taking, and make him guilty of felony; and that, consequently, the conviction could not be supported. *Bank's case, Russ. & Ry.* 441; 2 *Russ. by Grea.* 56.

To constitute a larceny by a party to whom goods have been delivered on hire, there must be not only an original intention to convert them to his own use, but a subsequent actual conversion. The prisoner was indicted for stealing a horse and gig. He had hired them of the prosecutor, a livery stable keeper, in London, stating that he wanted them for two days, for the purpose of going down to Windsor. Instead of going there, he drove to Romford, in Essex, where he arrived about twelve o'clock, and offered the horse and gig for sale to the landlord of the King's Head Inn, for 25*l.* The latter offered him 15*l.*, which the prisoner refused to accept, but half an hour afterwards, the gig being then in the yard, and the horse in the stable of the inn, he told the landlord that he would let him have them for the sum offered. On his cross-examination the landlord stated that the horse and gig were worth at least 45*l.*, in consequence of which his suspicions were excited, and that he did not intend to purchase them, unless the prisoner gave a satisfactory account of how he became possessed of them; that after the prisoner agreed to accept the 15*l.* his suspicions were increased, and he asked further questions of him, and then, under pretence of going to fetch the money, he procured a constable, and gave the prisoner into custody. Tindal, C. J., held, as there had been no actual conversion of the

property, but only an offer to sell, that the prisoner must be acquitted. *Brook's case*, 8 *C. & P.* 295; 2 *Russ. by Grea.* 54 (*n.*).

Proof of taking—no intent by prosecutor to part with the property in the goods—original felonious intent on the part of the prisoner—various cases amounting to larceny where goods are obtained by false pretences, ring-dropping, &c.] There is a numerous class of cases in which goods have been obtained from the owner with a fraudulent intent, but where the owner only intended to part with the possession, and not with the property in them. In these cases it has been held, that if the prisoner had the *animus furandi* at the time of the taking, and has converted the goods to his own use, the offence amounts to larceny. It has been generally in cases of this kind, that the distinction between larceny and obtaining goods under false pretences has been lost sight of. The false pretences are only the mode employed by the offender to procure the possession of the property, and render the case no less a larceny than if he had taken the property without the knowledge of the owner, or by force. The real distinction is, whether the owner intended to pass the right of property. If he did not, it is the subject of an indictment for larceny—if he did, of an indictment for obtaining money by false pretences.

The prisoner, J. H. Aickles, was indicted for stealing a bill of exchange, the property of S. Edwards. The prosecutor wanting the bill discounted, the prisoner, who was a stranger to him, called at his lodgings and left his address, in consequence of which, Edwards called on him, and the prisoner informed him that he was in the discounting line. Three weeks afterwards the prosecutor sent his clerk to the prisoner, to know whether he could discount the bill in question. The prisoner went with the clerk to the acceptor's house, where he agreed with the prosecutor to discount the bill on certain terms. After some conversation, the prisoner said that "if Edwards would go with him to Pulteney-street, he should have the cash." Edwards replied, that his clerk should attend him, and pay him the 25*s.* and the discount on receiving the money. On his departure, Edwards whispered to his clerk not to leave the prisoner without receiving the money, and not to lose sight of him. The clerk went with the prisoner to his lodgings, in Pulteney-street, where the prisoner showed him a room, and desired him to wait, saying, he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street, but, in turning a corner, missed him. The prosecutor and his clerk waited at the prisoner's lodgings three days and nights in vain. Being apprehended at another place, he expressed his sorrow, and promised to return the bill. The bill was seen in the hands of a person who received a *subpœna duces tecum*, but he did not appear, and it was not produced. It was objected, 1st, that the bill ought to be produced; and, 2ndly, that the facts, if proved, did not amount to felony. It was left to the jury to consider whether the prisoner had a preconcerted design to get the bill into his possession, with intent to steal it; and, next, whether the prosecutor intended to part with the bill to the prisoner, without having the money first paid. Upon the first point the jury found in the affirmative, and on the second, in the negative, and they found the prisoner guilty. Upon a reference to the judges, they held the conviction to be proper, as against both objections. *Aickles's case*, 2 *East, P. C.* 675; 1 *Leach*, 294.

The following observations are made by Mr. East on this case:—"From the whole transaction, it appeared that Edwards never gave

credit to the prisoner. It is true that he put the bill into his hands, after they had agreed upon the terms upon which it was to be discounted, that by showing it to the acceptor he might satisfy himself that it was a genuine acceptance. But besides, that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts; for Edwards, or his clerk, by his direction, continued with the prisoner until he ran away, for the very reason, because they would not trust him with the bill." 2 *East, P. C.* 677.

The prisoner was indicted for stealing a quantity of stockings. Meeting the prosecutor's apprentice on Ludgate Hill, he asked him if he was going to Mr. Heath, a hosier in Milk Street. The apprentice had at that time under his arm two parcels, directed to Mr. Heath, containing the articles in question; and, having answered in the affirmative, the prisoner told him that he knew his master, and owed him for the parcels; and he then gave the lad a parcel, which was afterwards found to be of no value, telling him to take it to his master directly, that it might be forwarded to a Mr. Browne; and then, with the consent of the apprentice, he took from him the parcels in question. The boy then left the prisoner, but returned and asked him if he was Mr. Heath. The prisoner replied that he was; on which the boy again left him. The jury found the prisoner guilty; but the recorder, doubting whether the facts amounted to felony, referred the case to the judges, who were of opinion that the conviction was proper. Mr. Justice Gould, in stating the reasons of the judgment, laid down the following rules as clearly settled: that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only intrusted with the care or custody of it for a particular purpose. *Wilkins's case*, 2 *East, P. C.* 673; 1 *Leach*, 520.

The prisoner went into a shop and asked a boy to give him change for half-a-crown; the boy gave him two shillings and six pennyworth of copper. The prisoner held out half-a-crown, which the boy caught hold of by the edge, but did not get it. The prisoner then ran away. Park, J., held this to be a larceny of the 2*s*. and the coppers; but said, if the prisoner had been charged only with stealing the half-crown, he should have had great doubt. *Williams's case*, 6 *C. & P.* 390.

On an indictment for stealing a receipt, it appeared that a landlord went to his tenant (who had removed all his goods) to demand his rent, amounting to 12*l*. 10*s*., taking with him a receipt, ready written and signed. The tenant gave him 2*l*., and asked to look at the receipt. On its being handed to him, he refused to return it, or to pay the remainder of the rent. The landlord, at the time he gave the prisoner the receipt, thought the prisoner was going to pay him the rent, and would not have parted with the receipt unless he had been paid all the rent; but when he put the receipt into the prisoner's hands, he never expected to have it again, and did not want it again, but wanted his rent paid. Coleridge, J., held that it was a larceny of the receipt, and that the fact of the prisoner paying the 2*l*. made no difference. *Rodway's case*, 9 *C. & P.* 784. See *John Smith's case*, *ante*, p. 575.

So obtaining money or goods by *ring-dropping, &c.* has been held to be larceny. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt for "a rich bril-

liant diamond ring." They offered to share the value of it with the prosecutor, if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to larceny. *Patch's case*, 1 *Leach*, 238 ; 2 *East, P.C.* 678. So where, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him ; this was also held to be larceny. *Moore's case*, 1 *Leach*, 314 ; 2 *East, P. C.* 679. To the same effect is *Watson's case*, 2 *Leach*, 640 ; 2 *East, P. C.* 680. So where the prosecutor was induced, by a preconcerted scheme, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed over the money to him ; and it was left to the jury to say, whether at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found there was; this was held to be larceny. *Robson's case, R. & R.* 413. In all these cases, it will be observed that the prosecutor had no intention of parting with the property in the money, &c., stolen, but either that it was taken while the transaction was proceeding, as in *Patch's case*, without his knowledge ; or was delivered under a promise that it should be restored, as in *Moore's case ;* or it was given to the party as a stakeholder, as in *Robson's case*.

Where one of the defendants, in the presence of the prosecutor, picked up a purse containing a watch, chain and two seals, which his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the share of the party who picked up the purse, for 7*l.* ; Coleridge, J., held this did not amount to larceny, as when the prosecutor parted with his money he never intended to have it back. The prisoners were afterwards convicted of a conspiracy to defraud the prosecutor. *Wilson's case*, 8 *C. & P.* 111.

Proof of the taking—no intent to part with the property by the prosecutor—original felonious intent on the part of the prisoner—cases of pretended purchases—larceny.] Where the owner of goods, which are taken by another with a fraudulent intent to convert them to his own use, parts with his property in such goods, although under the false pretence of a purchase, it is no larceny, as will be seen from the cases afterwards stated; but if there be only a negotiation for a purpose, and such purchase be not complete, the taking will amount to larceny, if there be a felonious intent on the part of the prisoner, as in the following case, which well illustrates the distinction between the offence of larceny, and of obtaining goods under the false pretence of purchasing them. The prisoner was indicted for stealing two silver cream-ewers from the prosecutor, a silversmith. He was formerly servant to a gentleman, who dealt with the prosecutor, and some time after he had left him, he called at the prosecutor's shop, and said that his master (meaning the gentleman whose service he had left) wanted some silver cream-ewers, and desired the prosecutor to give him one, and to put it down to his master's account. The prosecutor gave him two ewers, in order that his master might select the one he liked best. The prisoner took both, sold them, and absconded. At the trial the prosecutor swore that he did not charge the master (his customer)

with the cream-ewers, nor did he intend to charge him with either, until he had first ascertained which of them he had selected. It was objected for the prisoner, that this amounted merely to obtaining goods under false pretences; but Bayley, J., held, that as the prosecutor intended to part with the possession only, and not with the right of property, the offence was larceny, but that if he had sent only *one* cream-ewer, and had charged the customer with it, the offence would have been otherwise. *Davenport's case, Newcastle Spring Assizes*, 1826. *Archbold's Peel's Acts*, 5. The prisoner having bargained for some oxen, of which he agreed to become the purchaser, went to the place where they were in the care of a boy, took them away, and drove them off. By the custom of the trade, the oxen ought not to have been taken away till the purchase-money was paid. Garrow, B., left it to the jury to say, whether, though the beasts had been delivered to the prisoner under a contract, they thought he originally got possession of them without intending to pay for them, making the bargain the pretext for obtaining them, for the purpose of stealing them. The jury having found in the affirmative, the judges, in a case reserved, were unanimously of opinion, that the offence amounted to felony. *Gilbert's case, Gow, N. P. C.* 225 (*n*); 1 *Moody, C. C.* 185. The prisoner called at the shop of the prosecutor, and selected a quantity of trinkets, desiring they might be sent the next day to the inn where he lodged. An invoice was made out, and the prosecutor next day carried the articles to the inn. He was prevailed upon by the prisoner to leave them there, under a promise that he should be paid for them by a friend that evening. The prisoner and the prosecutor desired they might be taken care of. Half an hour afterwards the prisoner returned, and took the articles away. There were other circumstances showing a fraudulent intent, and the judge directed the jury, that if they were satisfied that the prisoner, when he first called on the prosecutor, had no intention of buying and paying for the goods, but gave the order for the purpose of getting them out of his possession, and afterwards clandestinely removing, and converting them to his own use, they should find him guilty, which they did; and the judges, on a case reserved, held the direction and conviction right. *Campbell's case*, 1 *Moody, C. C.* 179. This case was soon afterwards followed by another, to the same effect. The prisoner bargained for four casks of butter, to be paid for on delivery, and was told he could not have them on any other terms. The prosecutor's clerk at last consented that the prisoner should take away the goods, on the express condition that they should be paid for at the door of his house. The prisoner never took the goods to his house, but lodged them elsewhere. The prisoner was indicted for stealing the goods. The jury found that he had no intention to buy the goods, but to get them by fraud from the owner. A case being reserved, the judges were unanimously of opinion that the felony was complete, and the conviction good, the jury having found that the prisoner never meant to buy, but to defraud the owner. *Pratt's case*, 1 *Moody, C. C.* 250. So where the prisoner, bargaining with the prosecutor for some waistcoats, agreed to pay a certain price for them, but upon their being put into his gig, drove off without paying for them; and the jury found that "the waistcoats were parted with conditionally, that the money was to be paid at the time, and that the prisoner took them with a felonious intent;" it was held to be larceny. *Cohen's case*, 2 *Den. C. C. R.* 249. See also *Morgan's case*, 1 *Dears. C. C. R.* 395.

The prisoner by false pretences induced the prosecutor to send him by his servant, to a particular house, goods to the value of 2*s*. 10*d*. with change for a crown piece. On the way he met the servant, and induced him to part with the goods and change, giving him a crown piece, which proved to be bad. Both the prosecutor and his servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, but the former admitted that he intended to sell the goods, and never expected them back again. Mr. Serjeant Arabin told the jury that if they thought the servant had an uncontrolled authority to part with the cheese and the change, they ought to find the prisoner not guilty, but if they should be of a contrary opinion, then, in his judgment, it amounted to larceny. He further stated, that he had submitted the depositions to Parke, B., and Patteson, J., who had agreed with the opinion he had formed. The learned Serjeant afterwards said to the jury, "if you think it was a preconcerted scheme to get possession of the property, without giving anything for it, and that the servant had the limited authority only, then you will find the prisoner guilty." The prisoner was convicted. *Small's case*, 8 *C. & P.* 46.

A. received goods of B. (who was the servant of C.) under colour of a pretended sale. Coltman, J., held that the fact of A.'s having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. *Hornby's case*, 1 *C. & K.* 305.

Proof of the taking—intent to part with the property by prosecutor—original felonious intent on the part of the prisoner—false pretences.] —It may be laid down as a well-established principle, that if the owner of goods intends to part with the property in them to the prisoner, and in pursuance of such intention, delivers the goods to him, and he takes them away, he is not guilty of felony, although at the time of taking the goods he had no intention of paying for them, or otherwise performing his contract with the owner, but intended to appropriate them to his own use.

In the various cases before mentioned (p. 598 to p. 604), it will be observed that the owner of the goods had only intended to pass the possession of them to the prisoner; in all the cases under the present head, the intention was to pass the property.

Proof of the taking—intent to part with the property by prosecutor—original felonious intent of the prisoner—pretended purchases—false pretences.] The prisoner was indicted for horse-stealing, and it appeared in evidence that he met the prosecutor at a fair with a horse, which the latter had brought there for sale. The prisoner being known to him, proposed to become the purchaser. On a view of the horse, the prosecutor told the prisoner he should have it for 8*l*., and calling his servant, ordered him to deliver it to the prisoner, who immediately mounted the horse, telling the prosecutor that he would return immediately and pay him. The prosecutor replied "Very well," and the prisoner rode away, and never returned. Gould, J., ordered an acquittal, for here was a complete contract of sale and delivery; the property as well as possession was entirely parted with. *Harvey's case*, 2 *East, P. C.* 669; 1 *Leach*, 467. In this case, it was observed by the judge, that the prosecutor's only remedy was by

action. 1 *Leach*, 467. Had any false pretences been used, the prisoner might have been indicted under the 30 Geo. 2, c. 24.

Parks was indicted for stealing a piece of silk, the property of Thomas Wilson. The prisoner called at Wilson's warehouse, and having looked at several pieces of silk, selected the one in question. He said his name was John Williams, that he lived at No. 6, Arabella-row, and that if Wilson would send it that evening, he would pay him for it. Wilson accordingly sent his shopman with it, who, as he was taking the goods, met the prisoner. The latter took him into a room at No. 6, Arabella-row, examined the bill of parcels, and gave the servant bills drawn by Freth and Co., at Bradford, on Taylor and Co., in London. The bills were for more than the price of the goods. The servant could not give the change, but the prisoner said he wanted more goods, and should call the following day, which he did not do. Taylor and Co. said the notes were good for nothing, and that they had no correspondent at Bradford. Before the goods were sent from Wilson's, they were entered in a memorandum-book, and the prisoner was made debtor for them, which was the practice where goods were not paid for immediately. It was left to the jury to consider whether there was, from the beginning, a premeditated plan on the part of the prisoner, to obtain the goods without paying value for them, and whether this was a sale by Wilson, and a delivery of the goods with intent to part with the property, he having received bad bills in payment through the medium of his servant. The jury found that, from the beginning, it was the prisoner's intention to defraud Wilson, and that it was not Wilson's intention to give him credit; and they found him guilty. But the judges were of opinion that the conviction was wrong, the *property*, as well as the possession, having been parted with, upon receiving that which was accepted as payment by the prosecutor's servant, though the bills afterwards turned out to be of no value. *Parkes's case*, 2 *East*, *P. C.* 671; 2 *Leach*, 614. See *Small's case*, *ante*, p. 605.

The prisoner was a servant in the employment of grocers who were in the habit of purchasing "kitchen stuff." It was his duty to receive and weigh it, and if the chief clerk was in the counting-house, to give the seller a ticket, specifying the weight and price of the article and the name of the seller, which ticket was signed with the initials of the prisoner. The seller, on taking the ticket to the chief clerk, received the price of the "kitchen stuff." In the absence of the chief clerk, the prisoner had himself authority to pay the seller, and afterwards, on producing the ticket to the chief clerk, was repaid. The prisoner had, on the day mentioned in the indictment, presented a ticket to the chief clerk, purporting to contain all the usual specifications, and marked with the prisoner's initials, and demanded the sum of 2*s.* 3*d.*, which he alleged that he had paid for "kitchen stuff." He received the money, and appropriated it to his own use; and it was afterwards discovered that no such person as was described in the ticket had ever sold any such article to the prosecutors, but that the ticket was fraudulently made out and presented by the prisoner. The court held that this was a case of false pretences, and that an indictment for larceny could not be sustained, "as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him." *Barnes's case*, 2 *Den. C. C. R.* 59.

The circumstances of this case would have supported an indictment for obtaining the goods under false pretences.

Where the goods have been purchased *by a third person*, and the

prisoner obtains possession of them in that person's name, by false pretences, as the owner intends to part with the property, though to the third person, it has been held not to amount to felony. The prisoner was indicted for stealing a hat, in one count laid to be the property of Robert Beer, in another of John Paul. The prisoner bought a hat of Beer, a hat-maker, at Islington; but was told he could not have it without paying for it. While in the shop, he saw a hat which had been made for Paul, and saying that he lived next door to him, asked when Paul was to come for his hat. He was told in half an hour or an hour. Having left the shop, he met a boy, asked him if he knew Beer, saying, that Paul had sent him to Beer's for his hat; but that as he owed Beer for a hat himself, which he had not money to pay, he did not like to go. He asked the boy (to whom he promised something for his trouble) to carry the message to Beer's, and bring Paul's hat to him (the prisoner). He also told the boy not to go into Beer's shop, if Paul, whom he described, should be there. The boy went, and delivered the message, and received the hat, which, after carrying part of the way by the prisoner's desire, he delivered to him, the prisoner saying he would take it himself to Paul. The prisoner was apprehended with the hat in his possession. It was objected for him, that this was not larceny, but an obtaining goods under false pretences. The prisoner being found guilty, the question was reserved for the opinion of the judges, who decided that the offence did not amount to a felony, the owner having parted with his property in the hat. *R.* v. *Adam*, 2 *Russ. by Grea.* 28. See also *R.* v. *Box*, 9 *C. & P.* 126.

Proof of the taking—intent to part with the property by prosecutor—original felonious intent of prisoner—cases of obtaining goods, &c. by false pretences.] Under this head may be classed the cases, strictly speaking, of obtaining money under false pretences, cases in which, on account of the owner of the goods, &c., intending to part with the property in them, the offence does not amount to larceny, and where the possession of the goods has been fraudulently obtained by the prisoner under false pretences. The prisoners, Nicholson, Jones, and Chappell, were indicted for stealing two bank post bills and seven guineas. The prisoner Nicholson introduced himself to the prosecutor, at the apartments of the latter, in the Charter-house, under pretence of inquiring what the rules of the charity were. Discovering that the prosecutor had some money, he desired to walk with him, and having been joined by the prisoner Chappell, they went to a public house. The prisoner Jones then came into the room, and said that he had come from the country to receive 1400*l.*, and produced a quantity of notes. Chappell said to him, "I suppose you think that no one has any money but you." Jones answered, "I'll lay 10*l.* that neither of you can show 40*l.* in two hours." They then all went out, Nicholson and Chappell said that they should go to the Spotted Horse, and they both asked the prosecutor if he could show 40*l.* He answered, he believed he could. Nicholson accompanied the prosecutor home, when the latter took out of his desk the two bank post bills and five guineas. Nicholson advised him to take a guinea or two more, and he accordingly took two guineas more. They then went to the Spotted Horse, where Jones and Chappell were, in a back room. Jones put down a 10*l.* note for each who could show 40*l.* The prosecutor showed his 40*l.* by laying down the notes and guineas, but did not recollect whether he took up the 10*l.* given to him. Jones then wrote

four letters with chalk upon the table, and going to the end of the room, turned his back and said, that he would bet them a guinea a piece that he would name another letter which should be made and a basin put over it. Another letter was made and covered with a basin. Jones guessed wrong, and the others won a guinea each. Chappell and Nicholson then said, "We may as well have some of Jones's money, for he is sure to lose, and we may as well make it more, for we are sure to win." The prosecutor then staked his two notes and the seven guineas. Jones guessed right, and the notes lying on the table, he swept them all off and went to the other end of the room, the other prisoners sitting still. A constable immediately came and apprehended the prisoners. The prosecutor, on cross-examination, said, that he did not know whether the 10*l.* note given to him by Jones on showing 40*l.* was a real one or not. That having won the first wager, if the matter had ended there, he should have kept the guinea. That he did not object to Jones taking his 40*l.* when he lost, and would have taken the 40*l.* if he had won. The officers found on the prisoners many pieces of paper having numbers, such as 100, 50, &c., something in the manner of bank-notes, the bodies of the notes being advertisements of different kinds. No good notes were found upon them, but about eight guineas in cash. A lump of paper was put into the prosecutor's hands by Jones, when the officers came in, which was afterwards found to contain the two post bills. On the part of the prisoners it was contended, that this was a mere gaming transaction, or at most only a cheat, and not a felony. A doubt being entertained by the bench, on the latter point, it was left to the jury to consider whether this was a gaming transaction or a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion that it was a preconcerted scheme in all of them for that purpose, and found them guilty; but the judges held the conviction wrong, for in this case the possession as well as property had been parted with by the prosecutor, under the idea that it had been fairly won. *Nicholson's case*, 2 *East*, *P. C.* 669; 2 *Leach*, 610.

The prisoner, who had previously pawned certain articles at the shop of the prosecutor, brought a packet of diamonds, which he also offered to pawn, receiving back the former articles. The prosecutor's servant, who had authority to act in his business, after looking at the diamonds, delivered them back to the prisoner to seal up, when the prisoner substituted another parcel of false stones. He then received from the prosecutor's servant, the articles previously pledged, and carried them away. Being indicted for stealing these articles, Arabin, S., before whom he was tried, thought, that inasmuch as the property was parted with by the pawnbroker's servant, absolutely under the impression, that the prisoner had returned the parcel containing the diamonds, the offence did not amount to felony, and upon a case reserved, the judges resolved unanimously that the case was not larceny, because the servant, who had a general authority from his master, parted with the property, and not merely with the possession. *Jackson's case*, 1 *Moody*, *C. C.* 119. See *Longstreeths' case*, *Id.* 137, *ante*, p. 598.

Proof the things stolen—things savouring of the realty—at common law.] At common law larceny could not be committed of things that savoured of or adhered to the freehold, as trees, grass, bushes, bridges, stones, the lead of a house, or the like. 1 *Hale*, *P. C.* 510; 2 *East*,

P. C. 587. But if these things be severed from the freehold, as wood cut, grass in cocks, stones dug out of a quarry, &c., then felony might be committed by stealing them, for then they are personal goods. So if a man came to steal trees, or the lead of a church, and severed it, and after about an hour's time came and fetched it away, this was held felony, because the act was not continued, but interpolated, and in that interval the property lodged in the right owner as a chattel; and so with regard to corn standing on the ground, for that is a chattel personal. 1 *Hale, P. C.* 510. "If," says Gibbs, C. J., "a thief severs a copper and instantly carries it away, it is no felony at common law, yet if he lets it remain after it is severed any time, then the removal constitutes a felony, if he comes back and takes it; and so of a tree which has been sometime severed." *Lee* v. *Ridson*, 7 *Taunt.* 191. The rule on this subject is thus stated by the criminal law commissioners: "Although a thing be part of the realty, or be any annexation to, or unsevered produce of the realty, yet if any person sever it from the realty with intent to steal it, after an interval, which so separates the acts of severance and removal, that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connexion with the realty. If any parcel of the realty or any annexation to, or unsevered produce of the realty be severed, otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after that severance." 1*st Rep.* p. 11. To remedy the inconvenience which arose from this state of the law, it has been made larceny in certain cases to steal things annexed to a part of the freehold. These enactments will now be stated.

Proof of things stolen—things savouring of the realty—things annexed to buildings, &c.] By the 7 & 8 Geo. 4, c. 29, s. 44, "if any person shall steal, or rip, or cut, or break, with intent to steal any glass, or wood-work, belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil, or fixture, whether made of metal, or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny, and in case of any such thing being fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person."

The Irish act, the 9 Geo. 4, c. 55, s. 27, is in the same words, with a proviso that it shall not affect the punishment under the Irish paving acts.

Upon the repealed statute 4 Geo. 2, c. 32, it was held, that a person who procured possession of a house under a written agreement between him and the landlord, with a fraudulent intention to steal the fixtures belonging to the house, was, in stealing the lead affixed to the house, guilty of a felony within the statute. *Munday's case*, 2 *Leach*, 850; 2 *East, P. C.* 594.

With regard to what shall be deemed a *building* within this act, it was held (upon the 4 Geo. 2, which, after specifying certain buildings, used the words, "any other building whatever"), that a summer-house, half a mile from the dwelling-house, was within the act. *Norris's case, Russ. & Ry.* 69. So upon the same statute a majority

of the judges determined that a church was within the meaning of the act. *Parker's case*, 2 *East*, *P. C.* 592. But it was agreed that the property in lead affixed to a church could not be laid to be either in the churchwardens, or in the parishioners or inhabitants. *Id.* The new statute, by omitting to specify any particular building, and using only the words "any building whatsoever," has removed the doubts which gave rise to the above decisions. An unfinished building intended as a cart-shed, which was boarded up on all its sides, and had a door with a lock to it, and the frame of a roof ready for thatching, with loose gorse thrown on it, was held by Littledale, J., to be a building within the above section. *Worrall's* 7 *C.* & *P.* 516.

Upon the words, "any square, street, or other place dedicated to public use or ornament," it has been held that a churchyard comes within the meaning of the act. *Per Bosanquet, J.*, *Blick's case*, 4 *C.* & *P.* 377; see also *Reece's case*, 2 *Russ. by Grea.* 65; and a similar decision with respect to a tombstone in a churchyard, in *Jones's case*, 2 *Russ. by Grea.* 66.

The prisoner was indicted (in the usual form) for stealing lead affixed to a building. The jury found him guilty of stealing the lead when lying severed, but not of stealing it when fixed. Tindal, C. J., after conferring with Vaughan, B., held that the prisoner could not be found guilty of a simple larceny on such an indictment, and directed a verdict of not guilty to be entered. *Gooch's case*, 8 *C.* & *P.* 293.

An indictment for stealing a copper-pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants, in the same house. *Finch's case*, 1 *Moo. C. C.* 418.

Proof of the thing stolen—stealing from mines.] The stealing, or severing with intent to steal, the ore of any metal, &c. from a mine, is made felony by the 7 & 8 Geo. 4, c. 29, s. 37 (the 9 Geo. 4, c. 55, s. 30, I.), by which it is enacted, "that if any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

The following case has been decided on the subject of larceny in mines: The prisoners were indicted for stealing copper ore, the goods and chattels of A. B. and others. It appeared in evidence that A. B. and others were the lessees and adventurers in a mine, the ores in which were excavated by several distinct parties of labourers, working under separate contracts, and at different rates of wages, which were so much in the pound on the price of the ores when sold. The ores, when excavated, were left, by the men who dug them, in various heaps *in the mine*, and were afterwards raised to the surface, manufactured, and sold by and at the expense of the adventurers. The prisoners, who were contractors, worked in the mine at wages of 5*s.* in the pound, had taken ores from a neighbouring heap which had been dug out by other contractors working at 2*s.* in the pound, and had placed them on their own heap, and there left them, to be raised and manufactured by the adventurers in the usual course. The prisoners having been convicted, on a point reserved, a majority of

the judges were of opinion that the conviction was wrong, on the ground that there was no larceny *from the adventurers*, in whom the property was laid. *Webb's case*, 1 *Moo. C. C.* 431.

But now, by the 2 & 3 Vict. c. 58, s. 10, "for the prosecution and punishment of frauds in mines by idle and dishonest workmen, removing or concealing ore for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in or proprietors of such mines, or the honest and industrious workmen therein," it is enacted, "that if any person or persons employed in or about any mine within the county of Cornwall, shall take, remove, or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in any such mine, with intent to defraud the proprietor or proprietors of, or adventurer or adventurers in such mine, or any one or more of them respectively, or any workman or miner employed therein, then and in every such case respectively, such person or persons so offending shall be deemed and taken to be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny."

Proof of the thing stolen—trees, &c.] The stealing of trees, &c., of greater value than 1*l.*, growing in certain situations, is made felony by the 7 & 8 Geo. 4, c. 29, s. 38 (the 9 Geo. 4, c. 55, s. 31, I.), by which it is enacted, "that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

Upon the words "adjoining to a dwelling-house," it has been ruled, that they import actual contact; and therefore ground separated from the dwelling-house by a narrow walk and paling, with a gate in it, has been held not to be within their meaning. *Hodges's case, Moo. & Malk. N. P. C.* 341. There was no count, laying the trees to be growing in ground *belonging to* a dwelling-house. What is to be considered a garden, within this section, is a question for the jury. *Id.*

The stealing of trees, &c., of inferior value, is provided against by s. 39 (s. 32 of the Irish statute), by which it is enacted, "that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall, for the

first offence, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justices shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

The stealing of any part of any fence, post, rail, &c., and the being found in possession of any sapling, &c., or any part of any fence, &c., of the value of 2*s*., are by ss. 40 and 41 punishable by summary conviction.

The stealing of plants, fruits, and vegetable productions, growing in any garden, &c., is provided against by the 42nd section of the same statute (s. 35 of the 9 Geo. 4, c. 55, I.), by which it is enacted, "that if any person shall steal, or shall destroy or damage, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

The words "plant or vegetable production," do not include young fruit-trees. *Hodges's case, M. & M.* 341; 2 *Russ. by Grea.* 68 (*n*).

By s. 40, the stealing of the same articles not growing in any garden, &c., is punishable by summary conviction.

Proof of the things stolen—written instruments.] At common law, larceny could not be committed of deeds or other instruments concerning land. 1 *Hale, P. C.* 510. Thus it was held, that stealing a commission, directed to commissioners to ascertain boundaries, was not a felony, the commission concerning the realty. *Westbeer's case,* 1 *Leach,* 12; 2 *East, P. C.* 596; 2 *Str.* 1134. But the parchment upon which the records of a court of justice are inscribed, if it do not relate to the realty, may be the subject of larceny. *Walker's case,* 1 *Moo. C. C.* 155. Bonds, bills, and notes, which concern mere choses in action, were also at common law held not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property *in possession* of the party from whom they are taken. 4 *Bl. Com.* 234; 2 *East, P. C.* 597. It was even held, that

larceny could not be committed of the box in which charters concerning the land was held. 3 *Inst.* 109; 1 *Hale, P. C.* 510. Mortgage deeds being subsisting securities for the payment of money are "choses in action," and not "goods and chattels." Where, therefore, the prisoner was indicted for a burglary, in breaking into a house at night, "with intent to steal the 'goods and chattels' therein," and the jury found that he broke into the house with intent to steal mortgage deeds only, the conviction was quashed. "This was ruled," said Jervis, C. J., in delivering judgment, "in *Calye's case*, 8 *Co.* 33 (*a.*); 3 *Inst.* 109; and *Channell* v. *Robotham*, *Yelv.* 68, where it was decided that a bond could not be included under the words *bona et catalla*, though it was objected that the parchment and box were such, and might pass by that name, yet, forasmuch as the debt included and wrote upon it is the principal, the words of the grant ought to comprehend the name of the principal." *Powell's case*, 2 *Den. C. C. R.* 403.

But now, by the various provisions of the 7 & 8 Geo. 4, c. 29 (E.), these offences are rendered felonies.

By sec. 21, "if any person shall steal, or shall, for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award; and it shall not, in any indictment for such offence, be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value."

The Irish act, the 9 Geo. 4, c. 55, s. 21, contains similar provisions to these, and also some others.

As to the power of awarding hard labour and solitary confinement in cases of imprisonment, see *ante*, p. 572.

By sec. 22 (by the 9 Geo. 4, c. 55, s. 22, I.), "if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or, for any fraudulent purpose, destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned (viz. at the discretion of the court, transportation beyond the seas for the term of seven years, or such other punishment by fine or imprisonment, or by both, as the court shall award); and it shall not, in any indictment for such offence, be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value."

Semble, that an indictment under this section for destroying or concealing a will, should state the fraudulent purpose for which the

will was so destroyed, &c. *Per Alderson, B., R.* v. *Morris*, 9 *Carr. & P.* 59. A defendant concealing a will, and taking money which by the will is to go to A. and B., and with it paying the debts of the husband of the next of kin, whose creditor and assignee he is, would be a fraudulent purpose within the statute. *Ibid.*

And by the 7 & 8 Geo. 4, c. 29, s. 23 (E.), "if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned (*vide ante*, p. 613), and in any indictment for such offence, it shall be sufficient to allege the thing stolen, to be evidence of the title, or of part of the title, of the person, or of some one of the persons, having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value." The Irish act, 9 Geo. 4, c. 55, s. 23, is nearly similar.

Upon an indictment under the above section of the 7 & 8 Geo. 4, c. 29, for stealing writings relating to real estate, although the offence is only a misdemeanor, the jury must be satisfied that the defendant took them under such circumstances as would have amounted to larceny, if they had been the subject of larceny. *Per Patteson, J., John's case*, 7 *C. & P.* 324.

By sec. 24 it is provided, "that nothing in the act contained, relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment, to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any person aggrieved by any such offence, might or would have had, if the act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

Proof of the thing stolen—choses in action—securities for money, &c.] The stealing of choses in action was provided against by the 2 Geo. 2, c. 25, s. 3, which made it larceny to steal any exchequer orders or tallies, or other orders entitling any person to any annuity or share in any parliamentary fund, or any exchequer bills, South Sea bonds, bank-notes, East India bonds, dividend warrants of the bank, South Sea company, East India company, or any other company, society, or corporation, bills, bills of exchange, navy bills or debentures, goldsmiths' notes for the payment of money, or other bonds or warrants, bills or promissory notes, for the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the particulars were termed in law a chose in action. This statute is repealed, by the 7 & 8 Geo. 4, c. 27, except so far as such repeal may be considered as qualified by

the 2nd section of the act, which enacts, that nothing in the act contained shall affect or alter such part of any act as relates to the post-office, or any branch of the public revenue, or to the naval, military, victualling, or other public stores of his Majesty, &c., except the acts of 31 Eliz. c. 4, & 22 Car. 2, c. 5, which are thereinbefore repealed, or shall affect or alter any act relating to the bank of Scotland, or South Sea company. See 2 *Russ. by Grea.* 74.

And now, by the 7 & 8 Geo. 4, c. 29, s. 5, "if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate, to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank; or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom or of any foreign state; or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing; every such offender shall be deemed guilty of felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of like value, with the share, interest, or deposit, to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods, or other valuable thing, mentioned in the warrant or order; and each of the several documents thereinbefore enumerated, shall throughout the act be deemed for every purpose to be included under and denoted by the words 'valuable security.'" The Irish act, the 9 Geo. 4, c. 55, s. 5, contains a similar provision.

The statute extends to valuable securities for shares in the funds of a foreign body corporate or foreign company. *Smith's case*, 25 *L. J. M. C.* 30.

Upon an indictment for stealing a bill of exchange, it appeared that when the bill was stolen from the prosecutor, at Manchester, there were the names of two indorsers only upon it; but when negotiated by one of the prisoners at Leicester, the name of another indorser had been added. It was objected, that this being an indictment at Leicester for *then* and *there* stealing a bill, whereon the names of A. B. and C. D. were indorsed, it was not supported by evidence of a bill with the additional name of E. F. thereon, at the time of the negotiation by the prisoner at Leicester. The judges, however, resolved that the addition of the third name made no difference; that it was the same bill as originally stolen; and that the prisoner was properly convicted. *Austin's case*, 2 *East, P. C.* 602.

An agreement, although unstamped, is a chose in action. *Watt's case*, 1 *Dears. C. C. R.* 326; *S. C.* 23 *L. J. M. C.* 56.

Proof of property stolen—promissory notes.] Where the indictment is for stealing a promissory note, the proof must support the description of the note in the indictment. The prisoner was indicted under the 2 Geo. 2, c. 25, for stealing "a certain note, commonly called a promissory note," but the judges, on a case reserved, held the indictment wrong; that it was not sufficient to state it merely to be a *note*, the words of the statute being *bank-note*, or *promissory note* for payment of money; and they said that, "commonly called a bank-note" did not aid such originally wrong description. *Craven's*

case, Russ. & Ry. 14. So also where the instrument was described as "a bank post bill." *Chard's case, Id.* 488.

The promissory notes of a banker, payable at his correspondent's in London, and, after payment there, stolen on their return to the country, have been held to be "promissory notes," within the meaning of the statute 7 Geo. 3, c. 50 (against secreting letters in the post-office). Le Blanc, J., in delivering the resolution of the judges, said, the notes in point of form were strictly promissory notes, they remained uncancelled on the face of them, and as against the makers (the country bankers) they were valid and obligatory, so that into whose ever hands they might come for valuable consideration, they would be productive and available against the makers. *Ranson's case, Russ. & Ry.* 232; 2 *Leach,* 1090; acc. *West's case,* 26 *L. J. M. C.* 6.

Whether the paid re-issuable notes of a banker can be properly described as *valuable securities,* does not appear to be well settled; the safe mode of describing them is to treat them as goods and chattels. The prisoner was indicted in several counts for stealing a number of promissory notes, and in others for stealing so many pieces of paper, stamped with a stamp, &c. It appeared that the notes consisted of country bank notes, which, after being paid in London, were sent down to the country to be re-issued, and were stolen on the road. It was objected that these were no longer promissory notes, the sums of money mentioned in them having been paid and satisfied, and that the privilege of reissuing them, possessed by the bankers, could not be considered the subject of larceny. The judges, however, held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, and particularly the latter, being valuable to the owners. *Clark's case, Russ. & Ry.* 181; 2 *Leach,* 1036; 1 *Moo. C. C.* 222. In a later similar case, where re-issuable bankers' notes (paid in London) had been stolen from one of the partners on a journey, the prisoner having been convicted upon an indictment charging him in different counts with stealing valuable securities called promissory notes, and also with stealing so many pieces of paper stamped with a stamp, &c., the judges held the conviction right. Some of them doubted whether the notes could properly be called "valuable securities;" but if not, they all thought they were goods and chattels. *Vyse's case,* 1 *Moo. C. C.* 218. "In *Vyse's case,*" said Jervis, C. J., in passing judgment in *Powell's case,* 2 *Den. C. C. R.* 403, "the notes had been paid and though re-issuable, were not at the time of the larceny securities for the payment of money. The paper and stamp on which they were written were, therefore, properly described as goods and chattels."

Lord Ellenborough is said to have ruled, that it was not a felony under 2 Geo. 2, c. 25, to steal bankers' notes which were completely executed, but which had never been in circulation, because no money was due upon them; *Anon.* 4 *Bl. Com. by Christian,* 234 (*n*); but upon this decision it has been observed, that such notes would probably be deemed valuable property and the subject of larceny, at common law. 2 *Russ. by Grea.* 79 (*n*). See *Clark's* and *Vyse's cases* (*supra*).

If the halves of promissory notes are stolen, they should be described as goods and chattels. *Mead's case,* 4 *C. & P.* 535.

An incomplete bill of exchange or promissory note, is not as such a valuable security so as to be the subject of larceny. In conse-

quence of seeing an advertisement, A. applied to the prisoner to raise money for him. The latter promised to procure 5000*l.*, and producing ten blank 10*s.* stamps, induced A. to write an acceptance across them. The prisoner then took them, without saying anything, and afterwards filled them up as bills of exchange for 500*l.* each, and put them into circulation. It was held (at the Old Bailey), that these were neither "bills of exchange," "orders for the payment of money," nor "securities for money;" and that a charge of larceny for stealing the paper and stamps could not be sustained, the stamps and paper not being the property of A., or in his possession. *Minter Hart's case*, 6 *C. & P.* 106; see also *Phipoe's case*, 2 *Leach*, 673; 2 *East, P. C.* 599, *stated post*, p. 623.

Proof of the thing stolen—bankers' cheques.] A cheque upon a banker, drawn more than twenty miles from London, and not stamped, has been held not to be a *bill* or *draft*, within the 7 Geo. 3, c. 50; being of no value, nor in any way available. *Pooley's case, Russ. & Ry.* 12. So a cheque on a banker, made payable to A. B., and not to bearer, not being stamped, has been decided by the judges not to be a valuable security within the meaning of the 7 & 8 Geo. 4, c. 29, the banker being subject to a penalty of 50*l.* by paying it. *Yates's case*, 1 *Moo. C. C.* 170. But where A. was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper; and it was proved that the Great Western Railway Company drew in London a cheque on their London bankers, and sent it to one of their officers at Taunton to pay a poor-rate there, who at Taunton gave it to the prisoner, a clerk of the company, to take to the overseer, but instead of doing so, he converted it to his own use; it was held that even if the cheque was void under the 13th section of the statute 55 Geo. 3, c. 184, the prisoner might be properly convicted on the count for stealing a piece of paper. *Perry's case*, 1 *Den. C. C.* 69, 1 *C. & K.* 725; see also the same case reserved for the consideration of the judges, and similarly decided, 1 *Cox, C. C.* 222; see *Walsh's case*, and *Metcalf's case*, *post*, pp. 623, 624; also *Heath's case*, 2 *Moo. C. C.* 33.

Proof of the thing stolen—exchequer bills.] The 2 Geo. 2, c. 25, mentioned exchequer bills by name, and under that statute it was held, that where the indictment charged the prisoner with stealing "certain bills, commonly called Exchequer bills," and it appeared that they were signed by a person who had no authority to sign them, they were misdescribed, and the prisoner was entitled to an acquittal. *Astlett's case* (*first case*), 2 *Leach*, 954. But being afterwards indicted for stealing certain "securities" and "effects," the judges held that he was rightly convicted. *Id.* (*second case*), 958, 1 *Bos. & Pul. N. R.* 1.

Proof of the thing stolen—goods from vessels.] Various provisions were made by the 7 & 8 Geo. 4, c. 29 (the 9 Geo. 4, c. 55. I.), for the protection of goods in vessels.

By section 17 (of both statutes), it is enacted, "that if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to, or communicating with, any such port, river, or canal; or shall steal any goods or merchandize from any dock, wharf, or quay, adjacent

to any such port, river, canal, or creek; every such offender, being convicted thereof, [shall be liable to any of the punishments which the court may award, as herein-before last mentioned."] (Transportation for life, &c., sec. 14.)

Now by the 7 Wm. 4 and 1 Vict. c. 90, so much of the above section as relates to the punishment of persons convicted of any of the offences therein specified is repealed, and every person convicted after the commencement of the act of any such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.

For s. 3, authorising hard labour and solitary confinement in cases of imprisonment, see *ante*, p. 358.

The ship must be proved to be in the river, &c., mentioned in the indictment. Where the offence was laid to be committed in a barge on the Thames, and it was proved to have been committed in a barge lying aground on the banks of one of the creeks of the river, namely, Limehouse dock, it was held to be a fatal variance. *Pike's case*, 1 *Leach*, 417.

The luggage of a passenger going by a steam-boat has been held by Park, J., and Alderson, B., to be within the word "goods" in the above section. *Wright's case*, 7 *C. & P.* 159.

A man cannot be guilty of this offence in his own ship. *Madox's case*, *R. & R.* 92.

By the 7 & 8 Geo. 4, c. 29, s. 18 (the 9 Geo. 4, c. 55, s. 18, I.), it was enacted, that if any person should plunder or steal any part of any ship or vessel which should be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, should suffer death as a felon: provided always, that when articles of small value should be stranded or cast on shore, and should be stolen without circumstances of cruelty, outrage, or violence, it should be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender might be indicted and tried either in the county in which the offence should have been committed, or in any county next adjoining.

By the 7 Wm. 4 and 1 Vict. c. 87, s. 1 (E. & I.), so much of the above acts as is contained in the above section, and so much of the same acts as relates to the punishment of principals in the second degree, and accessaries before and after the fact respectively, to the felonies punishable under that act herein-before referred to, are repealed.

And by s. 8, "whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, and be convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

For s. 10, authorising hard labour and solitary confinement in cases of imprisonment, see *ante*, p. 596.

By the 7 & 8 Geo. 4, c. 29, s. 19 (the 9 Geo. 4, c. 55, s. 19, I.), "if any goods, merchandize, or articles of any kind belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or

on the premises of any person with his knowledge, and such person being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to, or for the use of, the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay, over and above the value of the goods, merchandize, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet."

By section 20, if any person offers shipwrecked goods for sale they may be seized.

Proof of the thing stolen—goods in process of manufacture.] By the 7 Geo. 4, c. 29, s. 16, "if any person shall steal to the value of ten shillings, any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender being convicted thereof, [shall be liable to any of the punishments which the court may award as hereinbefore last mentioned."] (Transportation for life. See section 14.)

The 9 Geo. 4, c. 55, s. 16, (I.) is a nearly similar enactment.

Now, by the 7 Wm. 4 & 1 Vict. c. 90, s. 2 (E. & I.), after reciting (*inter alia*) the above section of the 7 & 8 Geo. 4, c. 29, it is enacted, that so much of the said act as relates to the punishment of persons convicted of any of the offences hereinbefore specified, shall be repealed, "and every person convicted after the commencement of this act of any such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

For s. 3 authorises hard labour and solitary confinement in cases of imprisonment.

Where on an indictment under the (repealed) statute 18 Geo. 4, c. 27, for stealing yarn from a bleaching ground, it appeared that the yarn at the time it was stolen was in heaps, for the purpose of being carried into the house, and was not spread out for bleaching; Thompson, B., held that the case was not within the statute. *Hugill's case*, 2 *Russ. by Grea.* 225. So where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was held, that in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico. *Dixon's case*, *R. & R.* 53. But it is to be observed, that the repealed statute mentioned particularly a building, &c., made use of by any calico printer, &c., for printing, whitening, booking, bleaching, or dying. It has been decided that goods remain in a "stage, process or progress of manufacture," within the meaning of the 7 & 8 Geo. 4, c. 30, s. 3 (see *post*, *tit. Malicious Injuries*), and consequently also within the 7 & 8 Geo. 4, c. 29, s. 16, *supra*, though the texture be complete, if they are not yet brought into a condition for sale. *Woodhead's case*, 1 *Moo. & R.* 549.

Proof of the thing stolen—animals, &c., domestic animals.] Of domestic cattle, as sheep, oxen, horses, &c., or of domestic fowls, as hens, ducks, geese, &c., and of their eggs, larceny may be committed

at common law, for they are the subjects of property, and serve for food. 1 *Hale, P. C.* 511; *Hawk. P. C. b.* 1, *c.* 33, 843. The indictment should show the species of eggs, so that it may appear that they are the subject of larceny. *Cox's case*, 1 *C. & K.* 487; and see *Gallears's case*, 1 *Den. C. C. R.* 501; *S. C.* 19 *L. J. M. C.* 13. And it being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animal. Thus milking cows at pasture, and stealing the milk, was held felony by all the judges. *Anon.* 2 *East, P. C.* 617. So pulling the wool from a sheep's back. *Martin's case, Id.* 618. But it must be understood in this as in the other instance, that the fact is done fraudulently and feloniously, and not merely from wantonness or frolic, *Id.* The stealing of a stock of bees, also seems to be admitted to be felony. *Tibbs* v. *Smith, L. Raym.* 33; 2 *East, P. C.* 607; 2 *Russ. by Grea.* 83. The Scotch law corresponds with that of England in this respect, the stealing of bees *in a hive* being considered theft at common law, and the prosecutions for such thefts being very numerous. *Alison's Princ. Crim. Law of Scotland*, 280; see also 1*st Rep. Crim. Law C.* p. 14.

Proof of the thing stolen—animals feræ naturæ.] Larceny cannot be committed of animals, in which there is no property, as of beasts that are *feræ naturæ* and unreclaimed, such as deers, hares, or conies in a forest, chase, or warren, fish in an open river or pond, or wild fowl, at their natural liberty, although any person may have the exclusive right, *ratione loci aut privilegii*, to take them if he can in those places. 1 *Hale, P. C.* 511; 4 *Bl. Com.* 235, 6; 2 *East, P. C.* 607. So of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. 1 *Hale, P. C.* 511. So ferrets, though tame and saleable. *Searing's case, Russ. & Ry.* 350. So of rooks in a rookery. See *Hannam* v. *Mocket*, 2 *B. & C.* 934; 4 *D. & R.* 518.

Proof of the thing stolen—animals feræ naturæ—dead or reclaimed.] Where animals *feræ naturæ* are dead, reclaimed (and known to be so), or confined, and may serve for food, it is larceny at common law to take them. Thus, deer inclosed in a park, fish in a trench or net, or as it should seem in any other place which is private property, and where they may be taken at the pleasure of the owner at any time, pheasants or partridges in a mew, young hawks in a nest, or even old ones, or falcons reclaimed, and known by the party to be so. 1 *Hale, P. C.* 511; 2 *East, P. C.* 607. So of young pigeons in a dove-cote. 1 *Hale, P. C.* 511. So where pigeons were shut up in their boxes every night. *Per Parke, B., Luke's case, MS. Durham Spring Ass.* 1839. And the Court of Criminal Appeal has decided, that tame pigeons, although unconfined, with free access at their pleasure to the open air, are the subjects of larceny: Campbell. C. J., in pronouncing judgment saying, "it had been supposed that Parke, B., had decided, that there could be no larceny of pigeons, unless they were shut up in a house or box, but Parke, B., had in fact not so decided: we all think that tame pigeons may be the subject of larceny, although they have the opportunity of getting out and enjoying themselves in the open air." *Cheafor's case*, 2 *Den. C. C. R.* 361.

Of the eggs of hawks, or swans, though reclaimed, larceny cannot be committed, the reason of which is said to be, that a less punish-

ment, namely, fine and imprisonment, is appointed by statute for that offence. 2 *East, P. C.* 607; 2 *Russ. by Grea.* 83. And when an animal *feræ naturæ* is killed, larceny may be committed of its flesh, as in the case of wild deer, pheasants, partridges, &c., for the flesh or skins are the subject of property. 3 *Inst.* 116; 1 *Hale, P. C.* 83.

An indictment for stealing a dead animal should state that it was dead, for upon a general statement that the party stole the animal, it is to be intended that he stole it alive. *Per Holroyd, J., Edward's case, Russ. & Ry.* 498. So an indictment for stealing two turkies was held by Hullock, B., not to be supported by proof of stealing two dead turkies. *Halloway's case,* 1 *C. & P.* 128. So where the prisoner was indicted for stealing a pheasant, value 40*s.* of the goods and chattels of H. S. all the judges, after much debate, agreed that the conviction was bad; for in the case of larceny of animals *feræ naturæ*, the indictment must show that they were either dead, reclaimed, or confined, otherwise they must be presumed to be in their original state, and it is not sufficient to add "of the goods and chattels" of such a one. *Rough's case,* 2 *East, P. C.* 607. But where the prisoner was indicted for receiving a lamb before then stolen, and it appeared in evidence that the animal had been killed before it was received by the prisoner; the prisoner being convicted, the judges held the conviction good, according to the report, on the ground that it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same. *Puckering's case,* 1 *Moo. C. C.* 242; 1 *Lew. C. C.* 302.

Proof of the thing stolen—animals kept for pleasure only, and not fit for food.] There is, says Lord Coke, a distinction between such beasts as are *feræ naturæ*, and being made tame serve for pleasure only, and such as being made tame serve for food, &c. 3 *Inst.* 101. Thus, although the owner may have a lawful property in them, in respect of which he may maintain an action of trespass, yet there are some things of which, in respect of the baseness of their nature, larceny cannot be committed, as mastiffs, spaniels, greyhounds, and blood-hounds; and other things, though reclaimed by art and industry, as bears, foxes, ferrets, &c., and their whelps or calves, because though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c., which when made tame, serve for food. 1 *Hale, P. C.* 512; *Searing's case, Russ. & Ry.* 350, *ante*, p. 620. The rule with regard to animals *feræ naturæ* not fit for food, is said to include "bears, foxes, monkeys, apes, polecats, cats, dogs, ferrets, thrushes, singing birds in general, parrots and squirrels." 1*st Rep. Crim. Law Com.* p. 14. The young of wild animals are also included. *Id.*

Before the late game act, it was held that it is not necessary a person in possession of *game*, which has been reclaimed, should be qualified, in order to support an indictment laying the property in him. *Jones's case,* 3 *Burn's Just. tit. Larceny,* p. 84.

Proof of thing stolen—dogs, pigeons, &c.] By the 7 & 8 Geo. 4, c. 29, (E.) s. 31, (now repealed by the 8 Vict. c. 47, s. 1, E.) as far as relates to dogs, "if any person [shall steal any dog, or] shall steal any beast, or bird, ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being convicted thereof

before a justice of the peace, shall, for the first offence, forfeit and pay over and above the value of the [dog] beast, or bird, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet; and if any person so convicted, shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

And by s. 32 "if [any dog, or] any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession, or on the premises of any person by virtue of a search warrant, to be granted as hereinafter mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof, and the person in whose possession or on whose premises the same shall be so found, such person knowing that the [dog,] beast, or bird has been stolen, or that the skin is the skin of a stolen [dog, or] beast, or that the plumage is the plumage of a stolen bird, shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment as persons convicted of stealing any [dog,] beast, or bird, are hereinbefore made subject to."

And by s. 33, "if any person shall unlawfully and wilfully kill, wound, or take any house-dove, or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds."

The 9 Geo. 4, c. 55, ss. 28, 29, (I.) contain enactments similar to those in the above statute of the 7 & 8 Geo. 4, c. 29.

With regard to dogs, it is enacted by the 8 Vict. c. 47, (E.) s. 2, "that if any person shall steal any dog, every such offender shall be deemed guilty of a misdemeanor, and being convicted thereof before any two or more justices of the peace, shall, for the first offence, at the discretion of the said justices, either be committed to the common gaol or house of correction, there to be imprisoned only, or be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and if any person so convicted shall afterwards be guilty of the said offence, every such offender shall be guilty of an indictable misdemeanor, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, with or without hard labour, or by both, as the court in its discretion shall award, provided such imprisonment do not exceed eighteen months."

By s. 3, "if any dog, or the skin thereof, shall be found in the possession, or on the premises of any person, by virtue of any such warrant, to be granted as is hereafter in that behalf provided, the justice by whom such search warrant was granted may restore the same to the owner thereof, and the person in whose possession or on whose premises the same shall be found, such person (knowing the dog has been stolen, or that the skin is the skin of a stolen dog) shall, on

conviction before any two or more justices of the peace, be liable for the first offence to pay such sum of money, not exceeding twenty pounds, as to the justices shall seem meet; and if any person so convicted shall be afterwards guilty of the said offence, every such offender shall be deemed guilty of a misdemeanor, and punishable accordingly."

By s. 4, "if any person shall publicly advertise or offer a reward for the return or recovery of any dog which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any dog which shall have been stolen or lost without seizing or making any inquiry after the person producing such dog, every such person shall forfeit the sum of twenty-five pounds for such offence to any person who shall sue for the same, by action of debt, to be recovered with full costs of suit."

S. 5 provides for the apprehension of the offender without warrant by a police officer, or the owner of the dog.

By s. 6, "any person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and punishable accordingly."

By s. 7, "any justice may, if he shall think fit, remand for further examination, or may suffer to go at large, with or without sureties, upon his personal recognizance, any person who shall be charged before him with any offence or misdemeanor punishable by this act, whether the same be punishable by summary conviction, or as an indictable misdemeanor."

Proof of the thing taken—identity.] Evidence must be given to show the identity of the property taken. But a resemblance between the article stolen and the article lost, will in some cases be sufficient without positive proof of the identity, as in the case of corn, or sugar stolen, &c. 2 *East, P. C.* 657; 2 *Russ. by Grea.* 107, 108 (*n*); *R.* v. *Mansfield, Carr & M.* 140.

The prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with similar pepper in his possession. He had no right to be in the warehouse; and, on being discovered, said, "I hope you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk. It was held that there was sufficient evidence to go to the jury of the *corpus debiti.* *Burton's case*, 1 *Dears, C. C. R.* 282; *S. C.* 23 *L. J. M. C.* 52.

Proof of the thing taken—value.] Evidence must be given that the thing stolen is of some value. *Phipoe's case*, 2 *Leach*, 680. But it need not be of the value of some coin known to the law, as a farthing. *Per Parke, B.*, *R.* v. *Morris*, 9 *C. & P.* 349. Neither is it necessary that the property should be of value to third persons, if valuable to the owner. Therefore a man may be convicted of stealing bankers' re-issuable notes, which have been paid. *Clarke's case*, 2 *Leach*, 1037; *Ranson's case*, *id.* 1090; *Russ. & Ry.* 232, *ante*, p. 616. In *Walsh's case*, *R. & R.* 215, the judges are reported to have held (p. 220), that a cheque in the hands of the

drawer is of no value, and could not be the subject of larceny. But where the prisoner, who was employed by the prosecutors as an occasional clerk, received from them a cheque on their bankers, payable to a creditor, for the purpose of giving it to such creditor, and the prisoner caused the cheque to be presented by a third party, and appropriated the amount to his own use; and being found guilty of stealing the cheque, the judges affirmed the conviction. *Metcalf's case*, 1 *Moo. C. C.* 433. See *R.* v. *Perry*, *ante*, p. 617.

In certain statutory felonies, as stealing trees, &c., the article stolen must be proved to be of a certain value, *ante*, p. 611. In other cases, as for stealing a will, &c., *ante*, p. 613, it is not necessary to allege the property to be of any value.

Proof of ownership—cases where it is unnecessary to allege or prove ownership.] In some cases, in consequence of the provisions of certain statutes, it is unnecessary either to allege or prove the ownership of the property stolen, as upon an indictment upon the (repealed) 4 Geo. 2, c. 32 (see 7 & 8 Geo. 4, c. 29, s. 44, *ante*, p. 609), in which many of the judges thought that the right way of laying the case was, to allege the lead to have been fixed to a certain building, &c., without stating the property to be in any one. *Hickman's case*, 2 *East*, *P. C.* 593. So by 7 & 8 Geo. 4, c. 29, s. 22, upon an indictment for stealing a will, &c., it shall not be necessary to allege that such will, &c., is the property of any person, or that the same is of any value; and the same with regard to stealing records, &c., s. 21; see *ante*, p. 612.

Proof of the ownership—intermediate tortious taking.] It is an established and well known rule of law, that the possession of the true owner of goods cannot be divested by a tortious taking; and, therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the true owner. *Per Gould, J.*, *delivering the opinion of the judges*, *Wilkins's case*, 1 *Leach*, 522. If A., says Lord Hale, steal the horse of B., and after C. steal the same horse from A., in this case C. is a felon, both as to A. and B., for by the theft by A., B. lost not the property, nor in law the possession of his horse, and therefore C. may be indicted for felony in taking the horse of B. 1 *Hale, P. C.* 507. But if A. steals the horse of B., and afterwards *delivers it* to C., who was no party to the first stealing, and C. rides away with it, *animo furandi*, yet C. is no felon to B., because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it, neither is he a felon to A., for he had it by his delivery. *Ibid.* The doctrine as to property not being changed by felony, holds also with regard to property taken by *fraud*, for otherwise a man might derive advantage from his own wrong. *Per Gould, J.*, 1 *Leach*, 523; *Noble* v. *Adams*, 7 *Taunt.* 39; *Kelby* v. *Wilson*, *Ry. & Moo. N. P. C.* 178; *Irving* v. *Motley*, 7 *Bingh.* 543.

Proof of ownership—of goods in custodiâ legis.] Goods seized by the sheriff under a *fi. fa.* remain the property of the defendant until a sale. *Lucas* v. *Nockells*, 10 *Bingh.* 182. A sheriff's officer seized goods under a *fi. fa.* against J. S., and afterwards stole part of

them. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff; but upon the point being reserved, the judges held, that notwithstanding the seizure, the general property remained in J. S., and the loss would fall upon him if they did not go to liquidate the debt; that the seizure left the debt as it was, and that the whole debt continued until the goods were applied to its discharge. *Eastall's case*, 2 *Russ. by Grea.* 92.

Proof of ownership—goods of an adjudged felon.] The goods of an adjudged felon, stolen from his house, in the possession of, and occupation of his wife, may be described in an indictment for larceny as the goods of the queen; but the house cannot be so described without office found. *Whitehead's case*, 2 *Moo. C. C.* 181; *S. C.* 9 *C. & P.* 429.

Proof of ownership—goods of the offender himself.] Under certain circumstances a man may be guilty of larceny in stealing his own goods, or of robbery in taking them by violence from the person of another. And he may likewise be accessary after the fact to such larceny or robbery, by harbouring the thief, or assisting his escape. These cases arise where the property is in the temporary possession of another person, from whence the owner takes them with a fraudulent intent. Thus where A. delivers goods to B. to keep for him, and then steals them, with intent to charge B. with the value of them, this is felony in A. 1 *Hale, P. C.* 513, 514; *Foster*, 123; 2 *East, P. C.* 558. And if A., having delivered the money to his servant to carry, disguises himself, and robs him on the road, with intent to charge the hundred, this is undoubted robbery in A. *Foster*, 123, 144; 4 *Bl. Com.* 331. And there seems to be no objection in such case to laying the property in the servant. 2 *East, P. C.* 654. Goods were placed in the hands of lightermen, for the purpose of getting them passed at the customs, and conveyed on board ship. In order to defraud the government of the duties, the owner of the goods secretly abstracted them from the possession of the lightermen. The owner being convicted of larceny, upon a case reserved seven of the judges held it to be a larceny, because the lightermen had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully, and against their will, was a felonious intent, as against them, because it exposed them to a suit upon the bond given to the customs. In the opinion of some of the seven judges, it would have been larceny, although there had been no felonious intent against the lightermen, but only an intention to defraud the crown. Four of the judges doubted whether it was larceny, because there was no intent to cheat or charge the lightermen, but only an intention to defraud the crown. *Wilkinson's case*, *Russ. & Ry.* 470.

Upon the same principle, although the part-owner of goods cannot in general be guilty of larceny with regard to the other part-owners, yet if the property be in the possession of a person who is responsible for its safety, and a part-owner take it out of his possession, under such circumstances as would in ordinary cases constitute a larceny, it is a felony. Thus where a box, belonging to a benefit society, was deposited with the landlord of a public-house, who, by the rules of

the society, was answerable for its safety, and a member of the society broke into the house, and carried away the box; being convicted of the larceny, the judges on a case reserved were clear, that as the landlord was answerable to the society for the property, the conviction was right. *Bramley's case, Russ. & Ry.* 478. And where a friendly society had appointed a treasurer and two trustees; one of the trustees was held guilty of larceny in stealing the money of the society, the money being alleged in the indictment to be the property of the treasurer, and the jury having found that the prisoner had obtained the money from the treasurer with intent to steal it. *Cain's case*, 2 *Moo. C. C.* 204; *Car. & M.* 309. See also *Hall's case*, 1 *Moo. C. C.* 474, and *Watts's case*, 2 *Den. C. C. R.* 14.

Proof of ownership—goods of joint tenants, tenants in common, joint-stock companies, and partners.] In general, a party having a right of property in goods, and also a right to the possession, cannot be guilty of larceny with respect to such goods. Tenants in common, therefore, and joint tenants cannot be guilty of stealing their common goods. 1 *Hale, P. C.* 513; 2 *East, P. C.* 558.

Difficulties often arising with regard to the proof of the names of all the partners laid in an indictment, the following enactment was made for the purpose of removing the inconvenience:

By the 7 Geo. 4, c. 64, s. 14 (the 9 Geo. 4, c. 54, s. 28, I.), in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, it is enacted, that "in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and the provision shall be construed to extend to all joint-stock companies and trustees."

A bible had been given to a society of Wesleyan dissenters, and was bound at the expense of the society. No trust deed was produced. The bible having been stolen, the indictment charged the property to be in A. and others. A. was a trustee of the chapel and a member of the society. Parke, J., held the indictment right. *Boulton's case*, 5 *C. & P.* 537. It is not requisite that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C. upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but before the division, part of the stock was stolen; it was held, that the goods were properly described as the joint property of the surviving partner and the widow, upon an objection that the children of C. ought to have been joined, or the goods described as the property of the surviving partner and the ordinary, no administration having been taken out. *Gabey's case, R. & R.* 178. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and upon the death of the son, the father carried on the business for

the joint benefit of himself and his son's children, who were infants; it was held, upon an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father and his son's children. *Scott's case, R. & R.* 13; 2 *East, P. C.* 655.

Under a statute of the same session, the 7 Geo. 4, c. 46, s. 9, in indictments or informations by or on behalf of joint stock banking co-partnerships, for stealing or embezzling money, goods, effects, bills, notes, securities, or other property belonging to them, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, the money, &c., may be stated to be the property of, and the intent may be laid to defraud any one of the public officers of such copartnership, and the name of any one of their public officers may be used in all indictments or informations, where it otherwise would be necessary to name the person forming the company.

The 7 Geo. 4, c. 46, was amended and continued by the 1 & 2 Vict. c. 96, which was made perpetual by the 5 & 6 Vict. c. 85, and under which a shareholder in a joint stock banking company may be indicted for stealing or embezzling the goods or money of the company, it being laid as the property of a public officer of the company, duly appointed and registered under the acts. See *R.* v. *Atkinson*, 2 *Moo. C. C.* 278; *Carr. & M.* 525.

As to ownership of the property of friendly societies, see the 10 Geo. 4, c. 56; of loan societies, the 5 & 6 Wm. 4, c. 23, s. 4; in savings banks, the 9 Geo. 4, c. 92; in workhouses, the 5 & 6 Wm. 4, c. 69; of canal or navigation companies, the 8 Vict. c. 42.

Proof of ownership—goods in possession of children.] Clothes and other necessaries, provided for children by their parents, are often laid to be the property of the parents, especially where the children are of tender age; but it is good either way. 2 *East, P. C.* 654; *Russ. by Grea.* 94. In a case at the Old Bailey, in 1701, it was doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, an ancient clerk in court, said that it had always been usual to lay it to be the goods of the child in such case, and that many indictments, which had laid them to be the property of the father, had been ordered to be altered by the judges. 2 *East, P. C.* 654. Where a son, nineteen years of age, was apprenticed to his father, and, in pursuance of the indentures of apprenticeship, was furnished with clothes by the father, it was held, that the clothes were the property of the son exclusively, and ought not to have been laid in the indictment to be the property of the father. *Forsgate's case*, 1 *Leach*, 463. Where the prisoner was indicted for stealing a pair of trowsers, the property of J. Jones, and it appeared that J. Jones bought the cloth of which the trowsers were made, and paid for it, but the trowsers were made for his son Thomas, who was seventeen years of age: and J. Jones stated that he found clothes for his son, who was not his apprentice, but a labourer like himself, and worked for the same master, but at different work, and lived with his father; Patteson, J., said, "I think the property is well laid. It may be laid in these cases either in the father or the child; but the better course is to lay it in the child." *Hughes's case*, 2 *Russ. by Grea.* 95; *Car. & M.* 593.

Proof of ownership—goods in possession of bailees.] Any one who has a special property in goods stolen, may lay them to be his in an indictment, as a bailee, pawnee, lessee for years, carrier, or the like; *à fortiori*, they may be laid to be the property of the respective owners, and the indictment is good either way. But if it appear in evidence that the party, whose goods they are laid to be, had neither the property nor the possession (and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master), the prisoner ought to be acquitted on that indictment. 1 *Hale, P. C.* 513; 2 *East, P. C.* 652. Many cases have been decided on this principle.

Goods stolen from a *washerwoman*, who takes in the linen of other persons to wash, may be laid to be her property; for persons of this description have a possessory property, and are answerable to their employer, and could all maintain an appeal of robbery or larceny, and have restitution. *Packer's case*, 2 *East, P. C.* 653; 1 *Leach*, 357 (*n*). So an *agister*, who only takes in sheep to agist for another, may lay them to be his property; for he has the possession of them, and may maintain trespass against any who takes them away. *Woodward's case*, 2 *East, P. C.* 653; 1 *Leach*, 357 (*n*). A *coach-master*, in whose coach-house a carriage is placed for safe custody and who is answerable for it, may lay the property in himself. *Taylor's case*, 1 *Leach*, 356. So where a glass was stolen from a lady's chariot, which had been put up in a coach-yard, at Chelsea, while the owner was at Ranelagh, the property was held to be properly laid in the master of the yard. *Statham's case*, cited 1 *Leach*, 357. Goods at *an inn*, used by *a guest*, where stolen, may be laid to be either the property of the innkeeper or the guest. *Todd's case*, 2 *East, P. C.* 653. Where the *landlord of a public-house* had the care of a box belonging to a benefit society, and by the rules, he ought to have had a key, but in fact had none, and two of the stewards had each a key; the box being stolen, upon an indictment, laying the property in the landlord, Parke, J., held, that there was sufficient evidence to go to the jury of the property being in the landlord alone. *Wymer's case*, 4 *C. & P.* 391. A house was taken by Kyezor, and Miers, who lived on his own property, carried on the business of a silversmith there for the benefit of Kyezor and his family, but had himself no share in the profits and no salary, but had power to dispose of any part of the stock, and might, if he pleased, take money from the till as he wanted it. Miers sometimes bought goods for the shop, and sometimes Kyezor did. Bosanquet, J., held, that Miers was a bailee of the stock, and that the property in a watch stolen out of the house might properly be laid in him. *Bird's case*, 9 *C. & P.* 44.

When property is parted with by a bailee under a mistake, his special property in it is not divested; and if a larceny of it be committed, it may well be laid as the property of such bailee. *Vincent's case*, 2 *Den. C. C. R.* 464.

Proof of ownership—bailees—goods in possession of carriers, drivers of stage-coaches, &c.] Carriers, as bailees of goods, have such a possession as to render an indictment, laying the property in them, good. *Supra*. And so it has been held, with regard to the driver of a stage-coach. The prisoner was indicted for stealing goods, the property of one Markham. The goods had been sent by the coach driven by Markham, and had been stolen from the boot on the road. The question was, whether the goods were properly laid to be the property

of Markham, who was not the owner, but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for any thing stolen, and it not appearing that he had been guilty of any laches. Upon a case reserved the judges were of opinion, that the property was rightly laid in Markham; for though, as against his employers, he, as driver, had only the bare charge of the property committed to him, and not the legal possession, which remained in his masters, yet, as against all the rest of the world, he must be considered to have such a special property therein as would support a count charging them as his goods; for he had, in fact, the possession of and control over them; and they were intrusted to his custody and disposal during the journey. They said that the law, upon an indictment against the driver of a stage-coach, *on the prosecution of the proprietors*, considers the driver to have the *bare charge* of the goods belonging to the coach; but on a charge *against any other person*, for taking them tortiously and feloniously out of the driver's custody, *he* must be considered as the possessor. *Deakin's case*, 2 *Leach*, 862, 876; 2 *East*, *P. C.* 653.

Proof of ownership—goods of deceased persons, executors, &c.] Where a person dies intestate, and the goods of the deceased are stolen before administration granted, the property must be laid in the ordinary; but if he dies, leaving a will, and making executors, the property may be laid in the executor, though he has not proved the will; and it is not necessary that the prosecutor should name himself ordinary or executor, because he proceeds on his own possession. 1 *Hale, P. C.* 514; 2 *East, P. C.* 652. Where a deceased had appointed executors who would not prove the will, Bolland, B., and Coleridge, J., held, that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration. *George Smith's case*, 7 *C. & P.* 147. There can be no property in a dead body, and though a high misdemeanor, the stealing of it is no felony. A shroud stolen from the corpse must be laid to be the property of the executors, or of whoever else buried the deceased. So the coffin may be laid to be the goods of the executor. But if it do not readily appear who is the personal representative of the deceased, laying the goods to be the goods of a person unknown is sufficient. 2 *East*, *P. C.* 652; 2 *Russ. by Grea.* 98. A knife was stolen from the pocket of A. as he lay dead on a road in the diocese of W. A.'s last place of abode was at T. in the diocese of G., but A.'s father stated, that he believed his son had left T. to come to live with him, but he did not know whether his son had given up his lodgings at T. Patteson, J., held, that there was sufficient proof to support a count for larceny, laying the property in the Bishop of W. *Tippin's case*, *Car. & M.* 545.

In some cases the property of an intestate has been held to be rightly described as being in the party in actual possession, no administration having been granted. D. and C. were partners; C. died intestate, leaving a widow and children. From the time of his death, the widow acted as partner with D., and attended to the business of the shop. Three weeks after his death part of the goods were stolen, and were described in the indictment as the goods of D. and the widow. It was contended, that the name of the children, as next of kin, should have been joined, or that the property should have been laid in D. and the ordinary; but Chambre, J., held, that actual possession, as owner,

was sufficient, and the judges, on a case reserved, were of the same opinion. *Gabey's case, Russ. & Ry.* 178. So where a father and son carried on business as farmers, and the son died intestate; after which the father carried on the business for the joint benefit of himself and the son's next of kin, some of the sheep being stolen, and being laid as the property of the father and next of kin, the judges, on a case reserved, held the indictment right. *Scott's case, Russ. & Ry.* 13.

Proof of ownership—goods of lodgers.] Where a room, and the furniture in it, are let to a lodger, he has the sole right to the possession, and if the goods are stolen, it has been held, in two cases, by the judges, that the property must be laid in the lodger. *Belstead's case, Russ. & Ry.* 411; *Brunswick's case,* 1 *Moo. C. C.* 26.

Proof of ownership—goods of married women.] Where goods, in the possession of a married woman, are stolen, they must not be described as her property, but as that of her husband; for her possession is his possession. 2 *East, P. C.* 652. See *French's case, Russ. & Ry.* 491; *Wilford's case, Id.* 517, stated *ante,* p. 343. Where the goods of a *feme sole* are stolen, and she afterwards marries, she may be described by her maiden name. *Turner's case,* 1 *Leach,* 536.

Proof of ownership—goods of persons unknown.] Felony may be committed in stealing goods, though the owner is not known, and they may be described in the indictment as the goods of a person to the jurors unknown; and the king is entitled to them. 1 *Hale, P. C.* 512; 2 *East, P. C.* 651. But if the owner be really known, an indictment, alleging the goods to be the property of a person unknown, is improper. 2 *East, P. C.* 651.

In prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino;* it is not enough that the prisoner is unable to give a good account how he came by the goods. 2 *East, P. C.* 651; 2 *Hale, P. C.* 290. An indictment for plundering a wreck contained two counts: The first count stated the property in the ship to be in certain persons named; the second, in persons unknown. The witness for the prosecution could not recollect the christian name of some of the owners. The counsel for the crown then relied on the second count, but Richards, C. B., said, "I think the prisoner must be acquitted. The owners, it appears, are known, but the evidence is defective on the point. How can I say that the owners are unknown?" *Robinson's case, Holt's N. P. C.* 596; 2 *Russ. by Grea.* 98 (*n*).

Proof of ownership—goods of servants.] In general, the possession of a servant is the possession of the master, the servant having merely the charge and custody of the goods; and in such case, the property must be laid in the master, and not in the servant. 2 *East, P. C.* 652; 2 *Russ. by Grea.* 92. Upon an indictment for stealing goods from a dissenting chapel, laying the property in one Evans, it appeared that Evans was the servant of the trustees of the chapel; that he had a salary of 5*l.* a year, with the care of the chapel, and the things in it, to clean and keep in order; that he held the only key of the chapel, but that the minister had a key of the vestry, through which he might enter the chapel. Upon a case reserved the judges were of opinion, that the property of the goods taken could

not be considered as belonging to Evans. *Hutchinson's case*, *Russ. & Ry.* 412. But in some cases, as against third persons, a party who, as against his employer, has the bare *charge* of goods, may be considered as having the possession, as in the case of the driver of a stage-coach. *Ante*, p. 628. So where the owner of goods steals them from his own servant, with intent to charge him with the loss, the goods may, as already stated, be described as the property of the servant. *Ante*, p. 625.

Proof of ownership—of corporations.] Where goods are the property of a company of persons not incorporated, they must be described as the goods of the individuals, or of some one of the individuals, and others. 1 *Russ. by Grea.* 99. But by the 7 Geo. 4, c. 64, s. 20 (the 9 Geo. 4, c. 54. I.), judgment shall not be stayed or reversed on the ground that any person or persons mentioned in an indictment or information, is or are designated by the name of office, or other descriptive appellation, instead of his, her, or their proper name or names.

The goods of a corporation must be described as their goods, by their corporate name. Where in an indictment the goods were laid to be the property of A. B. C. D., &c., they the said A. B. C. D., &c., being the churchwardens of the parish church; and it appeared that the churchwardens were incorporated by the name of "the churchwardens of the parish church of Enfield," the court (at the Old Bailey) held the variance fatal. They said, that where any description of men are directed by law to act in a corporate capacity, their natural and individual capacity, as to all matters respecting the subject of their incorporation, is totally extinct. If an action were brought in the private names of the prosecutors, for any matter relating to their public capacity, they must unavoidably be nonsuited, and *à fortiori* it must be erroneous in a criminal prosecution. *Patrick's case*, 1 *Leach*, 252. But where trustees were appointed by act of parliament (but not incorporated), for providing a workhouse, and property stolen from them was laid to be the property of "the trustees of the poor of," &c., without naming them, the court (at the Old Bailey) held it wrong; for as the act had not incorporated the trustees, and by that means given them collectively a public name, the property should have been laid as belonging to A. B., &c. by their proper names, and the words "trustees of the poor of," &c. subjoined as a description of the capacity in which they were authorised by the legislature to act. *Sherrington's case*, 1 *Leach*, 513. On the authority of this case the following was decided: By the 24 Geo. 3, c. 15, certain inhabitants in seven parishes were incorporated by the name of "the guardians of the poor of," &c. Twelve directors were to be appointed out of the guardians, and the property belonging to the corporation was vested in "the directors for the time being," who were to execute the powers of the act. The prisoner was indicted for embezzling the moneys of the "directors of the poor of," &c. The judges on a case reserved held, that the money should have been laid, either as the money of the guardians of the poor, by their corporate name, or of the directors for the time being, by their individual names. *Beacall's case*, 1 *Moo. C. C.* 15. See *Jones and Palmer's case*, 1 *Leach*, 366; 2 *East*, *P. C.* 991.

Proof of the ownership—goods belonging to counties, &c.] By the 7 Geo. 4, c. 64, s. 15, with respect to the property of counties, ridings,

and divisions, it is enacted, that "in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole, or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants." The 9 Geo. 4, c. 54, s. 29 (I.), contains a somewhat similar statement.

Proof of the ownership—goods for the use of the poor of parishes.] By the 7 Geo. 4, c. 64, s. 16, with respect to the property of parishes, townships, and hamlets, it is enacted, that "in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse, or poorhouse, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor committed on, or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike-road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors."

Money stolen from an ancient poor's box fixed up in a church is properly laid in the vicar and churchwardens of the parish. *Wortley's case*, 1 *Den. C. C. R.* 162.

Proof of ownership—goods, &c., of trustees of turnpikes.] By the 7 Geo. 4, c. 64, s. 17, with respect to property under turnpike trusts, it is enacted, that "in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners."

Proof of ownership—goods, &c., of commissioners of sewers.] By

the 7 Geo. 4, c. 64, s. 18, with respect to property under commissioners of sewers, it is enacted, that "in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognisance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognisance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners."

Proof of ownership—goods belonging to friendly societies, &c.] By the 10 Geo. 4, c. 56, s. 21, the moneys, goods, chattels, securities for money, and all other effects whatever, belonging to any friendly society, may be described to be the property of the person appointed to the office of treasurer or trustee of the society for the time being, in his proper name, without further description. So by the 9 Geo. 4, c. 92, s. 8, the moneys, goods, chattels, and effects, and securities for money, or other obligatory instruments and evidences or muniments belonging to any savings bank may be stated to be the property of the trustee or trustees of such institution for the time being, in his, her, or their proper names, without further description. So by the 4 & 5 Wm. 4, c. 23, for the establishment of loan societies in England and Wales (s. 4), the moneys, goods, chattels, and effects belonging to any such institution, may be stated to be the property of the trustee or trustees thereof for the time being, in his or their proper name, without further description.

See as to friendly societies, *Bramley's case*, and *R.* v. *Cain*, *ante*, p. 626.

Presumption of guilt arising from the possession of stolen property.] Many of the cases on this subject have already been considered; *ante*, p. 18. The question of what is or is not a recent possession of stolen property, is to be considered with reference to the nature of the article stolen. Therefore, where two ends of woollen cloth, in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they were stolen, and were still in the same state, Patteson, J., held, that as they were not articles such as pass from hand to hand readily, it was a question for the jury, whether the usual presumption did not arise. *Partridge's case*, 7 *C. & P.* 551; see *Cockin's case*, 2 *Lew. C. C.* 235.

The prisoner was indicted in October for stealing a shirt. Evidence was adduced to show that he had had access to the premises of the prosecutor about twelve months since, and the shirt was sworn to have been safe in the prosecutor's possession somewhat about the same period of time. It was missed in the March previous to this indictment, and was found upon the prisoner when he was apprehended. It was submitted for the prosecution that there was sufficient evidence to go to the jury to prove the prisoner was the thief. But Pollock, C. B., said, "It will be pushing the doctrine of possession rather too far to hold this sufficient. There is a certain period, after which I should think it very unfair to assume theft from mere possession, even where the property is proved *aliunde* to have been stolen. Still less can I infer felony where, from anything that appears, the article may never have been stolen at all." Coleridge, J., assented, and the jury were directed to acquit. *Hall's case*, 1 *Cox, C. C.* 231. In a charge of larceny, if the prosecutor cannot

swear to the loss of the article said to be stolen, the prisoner must be acquitted. *Dredge's case*, 1 *Cox, C. C.* 235. See also *R.* v. *Crowhurst*, 1 *C. & K.* 370, *ante*, p. 78.

Restitution of stolen property.] The 7 & 8 Geo. 4, c. 29, s. 57 (9 Geo. 4, c. 55, s. 50, I.), to encourage the prosecution of offenders, enacts, that "if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence by or on behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner, or his representative; and the court, before whom any such persons shall be so convicted, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, or converted as aforesaid; in such case, the court shall not award or order the restitution of such security."

The court cannot, under the above provision, order a bank of England note, which has been paid and cancelled, to be delivered up to the prosecutrix of an indictment against the party who stole it. *Stanton's case*, 7 *C. & P.* 431. Where a prisoner was convicted of stealing money, and it appeared that he had left in the care of another a horse, which it was clear from the evidence he must have purchased with the stolen money; Mirehouse, C. S., after consulting Gurney, B., and Williams, J., made an order for the delivery of the horse to the prosecutor. *Powell's case*, 7 *C. & P.* 640.

The effect of a conviction is to revert the property in the goods stolen in the prosecutor; and this even though there may have been a sale of the goods in market overt. The statutable remedy does not take away the remedy by an action of trover. *Scattergood* v. *Silvester*, 15 *Q. B.* 506.

Venue.] An indictment for larceny must be tried in the county in which the offence was, either actually, or in contemplation of law, committed. But where goods stolen in one county are carried by the offender into another or others, he may be indicted in any of them, for the continuance of the asportation is a new caption. 1 *Hale, P. C.* 507; 4 *Bl. Com.* 305; 1 *Moo. C. C.* 47 (*n*). The possession still continuing in the owner, every moment's continuance of the trespass is as much a wrong, and may come under the word *cepit* as much as the first taking. *Hawk. P. C. b.* 1, *c.* 19, *s.* 52. Though a considerable period elapse between the original taking and the carrying of them into another county, the rule still applies; as where property was stolen on the 4th November, 1823, in Yorkshire, and carried into Durham on the 17th March, 1824. *Parkin's case*, 1 *Moo. C. C.* 45. This rule does not, however, hold with regard to compound larcenies, in which case the prisoner can only be tried for simple larceny in the second

county. Thus, where the prisoner robbed the mail of a letter, either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted on the statutes, 5 Geo. 2, c. 25, and 7 Geo. 3, c. 40, the judges upon a case reserved held, that he could not be convicted capitally out of the county in which the letter was taken from the mail. *Thompson's case*, 2 *Russ. by Grea.* 116. So if A. robs B., in the county of C., and carries the goods into the county of D., A. cannot be convicted of robbery in the latter county, but he may be indicted for larceny there, 2 *Hale, P. C.* 163. If the thing stolen be altered in its character in the first county, so as to be no longer what it was when it was stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. 2 *Russ. by Grea.* 116; see *Edward's case, Russ. & Ry.* 497. Thus an indictment in the county of H., for stealing "one brass furnace," is not supported by evidence that the prisoner stole the furnace in the county of R., and there broke it to pieces, and brought the pieces into the county of H. *Halloway's case*, 1 *C. & P.* 127. A joint original larceny in one county may become a separate larceny in another. Thus where four prisoners stole goods in the county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in separate bags, it was ruled by Holroyd, J., that the joint indictment against all the prisoners could not be sustained as for a joint larceny in the county of Worcester; and he put the counsel for the prosecution to his election, as to which of the prisoners he would proceed against. *Barnett's case*, 2 *Russ. by Grea.* 117. But where a larceny was committed by two, and one of them carried the stolen goods into another county, the other still accompanying him, without their ever having been separated, they were held both indictable in either county, the possession of one being the possession of both in each county, as long as they continued in company. *M'Donagh's case, Carr. Suppl.* 23, *2nd ed.*

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. The prisoners, County and Donovan, laid a plan to get some coats from the prosecutrix, under pretence of buying them. The prosecutrix had them in Surrey at a public-house, the prisoners got her to leave them with Donovan, whilst she went with County, that he might get the money to pay for them. In her absence, Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was against both in Middlesex, and upon a case reserved the judges were unanimous, that as County was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in Middlesex. They therefore held the conviction right. *County's case*, 2 *Russ. by Grea.* 118.

The prisoner was tried in Kent for stealing two geldings in that county. The horses were stolen in Sussex. The prisoner was apprehended with them at Croydon, in Surrey. The only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, he said he had been at Dorking to fetch the horses, and that they belonged to his brother who lived at Bromley. The police officer offered to go to Bromley. They took the horses and went as far as Beckenham church, when the prisoner said he had left a parcel at the Black Horse, in some place in Kent. The police

officer went thither with him, each riding one of the horses; when they got there, the officer gave the horses to the ostler. The prisoner made no inquiry for the parcel, but effected his escape, and afterwards was again apprehended in Surrey. The prisoner was convicted, but sentence was not passed, Gaselee, J., reserving the question whether there was any evidence to support the indictment in Kent. The judges were unanimously of opinion, that there was no evidence to be left to the jury of stealing in Kent, and that no judgment ought to be given upon the conviction, but that the prisoner should be removed to Surrey. *Simmond's case*, 1 *Moody, C. C.* 408. The prisoner was indicted for a larceny at common law, for stealing a quantity of lead in Middlesex. It appeared that the lead was stolen from the roof of the church of Iver, in Buckinghamshire. The prisoner being indicted at the central criminal court, which has jurisdiction in Middlesex, and not in Buckinghamshire, the judges (Park, J., Alderson, B., and Patteson, J.) held, that he could not be convicted there, on the ground that the original taking not being a larceny, but a felony created by statute, the subsequent possession could not be considered a larceny. *Millar's case*, 7 *C. & P.* 665.

The 7 & 8 Geo. 4, c. 29, s. 76—in the case of property stolen in one part of the united kingdom, and carried into another part—enacts, that "if any person, having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever, in any one part of the united kingdom, shall afterwards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the united kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part."

If the original taking be such of which the common law cannot take cognizance, as where the goods are stolen at sea, the thief cannot be indicted for larceny in any county into which he may carry them. 3 *Inst.* 113; 2 *Russ. by Grea.* 119. And so where the goods are stolen abroad (as in Jersey), carrying them into an English county will not render the offender indictable there. *R.* v. *Prowes*, 1 *Moody, C. C.* 349. So where the goods are stolen in France. *R.* v. *Madge*, 9 *C. & P.* 29.

See also *tit. Venue, ante*, p. 244.

LIBEL.

Blasphemous libels—at common law.] ALL blasphemies against God, or the Christian religion, or the Holy Scriptures, are indictable at common law, as also are all impostors in religion, such as falsely pretend extraordinary missions from God, or terrify or abuse the people with false denunciations of judgment. In like manner all malicious revilings, in public derogation and contempt of the established religion, are punishable at common law, inasmuch as they tend to a breach of the peace. 1 *East, P. C.* 3; 1 *Russ. by Grea.* 220. So it has been held, that to write against christianity in general is clearly an offence at common law, but this rule does not include disputes between learned men on particular controverted points, but only refers to those cases where the very root of christianity itself is struck at. *Woolston's case, Fitzgib.* 66; 2 *Str.* 834. It is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. *Hetherington's case*, 5 *Jur.* 529.

With regard to the boundary of the rule regulating the discussion of religious topics, it is observed by Mr. Starkie, that a malicious and mischievous intention, or what is equivalent to such intention, in law as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy, or even to weaken men's sense of religious or moral

obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete. 2 *Starkie on Slander*, 147, 2*nd ed.* Upon an indictment alleging that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman inquired whether a work denying the divinity of our Saviour was a libel; Abbott, C. J., stated, that a work speaking of Jesus Christ in the language here used was a libel, and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer to the question put, the Court of King's Bench held the answer correct. *Waddington's case*, 1 *B. & C.* 26.

Blasphemous libels—statutes.] By the 1 Ed. 6, c. 1, persons reviling the sacrament of the Lord's supper, are punishable by imprisonment. By the 1 Eliz. c. 2, *ministers* and others speaking in derogation of the book of Common Prayer, are punishable as therein mentioned. See also the 12 Eliz. c. 12; 3 Jac. 1, c. 21, s. 9.

By the 9 & 10 Wm. 3, c. 32, s. 1, "if any person or persons having been educated in, or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking [deny any one of the Persons in the Holy Trinity to be God or] shall assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, shall upon an indictment or information in any of his Majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid, shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid, of all or any of the aforesaid crime or crimes, then he or they shall from thenceforth be disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical for ever within this realm; and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction."

By s. 2, information of such words must be given upon oath before a justice, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

By s. 3, persons convicted shall for the first offence (upon renunciation of such offence or erroneous opinions in the court where they were convicted, within four months after such conviction) be discharged from all penalties and disabilities incurred by such conviction.

So much of the 1 Wm. 3, c. 18, s. 17, and 9 & 10 Wm. 3, c. 32, as related to persons denying the doctrine of the Trinity, was repealed by the 53 Geo. 3, c. 160. The statute of the 9 & 10 Wm. 3 has been held not to affect the common law offence, being

cumulative only. *Carlile's case*, 3 *B. & A.* 161; *Waddington's case*, 1 *B. & C.* 26.

Indecent libels.] Although an opinion formerly prevailed, that the publication of an obscene or indecent writing, not containing reflections upon any individual, was not an indictable offence; *Hawk. P. C. b.* 2, *c.* 73, *s.* 9; yet a different rule has been since established, and it is now clear, that an indictment at common law may be maintained for any offence which is against public morals or decency. *Sedley's case, Sid.* 168; *Wilkes's case*, 4 *Burr.* 2530; *Holt on Libel*, 73, 2*nd ed.* Under this head may be comprehended every species of representation, whether by writing, by printing, or by any manner of sign or substitute, which is indecent and contrary to public order. *Holt, ubi supra.* The principle of the cases also seems to include the representation of obscene plays, an offence which has formed the ground of many prosecutions. 2 *Stark. on Slander*, 159, 2*nd ed.*; *Holt*, 73; 1 *Russ. by Grea.* 233.

Libels on the government.] The result of the numerous cases respecting libels on the government, is thus given by Mr. Starkie: "It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; where this boundary is overstepped, and the limit abused for wanton gratification or private malice, in aiming a stab at the private character of a minister, under colour and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy or contumely, under pretence of exposing defects, or correcting errors, but in reality for the purpose of impeding or obstructing the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal." 2 *Stark. on Slander*, 183, 2*nd ed.* The test, with regard to libels of this description, proposed by Mr. Starkie and adopted by another eminent text-writer, is this: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards government?" 1 *Russ. by Grea.* 237; see also *Lambert's case*, 2 *Campb.* 398; *Tuchin's case, Holt, R.* 424; 5 *St. Tr.* 583; *Holt on Libel*, 88, 89; *R.* v. *Collins*, 9 *C. & P.* 456; *R.* v. *Lovett, ibid.* 462.

Libels on the administration of justice.] Where a person, either by writing, by publication in print, or by any other means, calumniates the proceedings of a court of justice, the obvious tendency of such an act is to weaken the administration of justice, and consequently to sap the very foundations of the constitution itself. *Per Buller, J., Watson's case*, 2 *T. R.* 199. It certainly is lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge; but if the writing in question contain no reasoning or discussion, but only declamation and invective, and is written, not with a view to elucidate the truth, but to injure

the character of individuals, and to bring into hatred and contempt the administration of justice, such a publication is punishable. *Per Grose, J., White's case*, 1 *Campb.* 359.

Libels upon individuals.] A libel upon an individual is defined by Mr. Serjeant Hawkins to be a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one that is dead, or the reputation of one that is alive, and expose him to public hatred, contempt, or ridicule. *Hawk. P. C. b.* 2, *c.* 73, *s.* 1. Though the words impute no punishable crime, yet if they contain that sort of imputation which is calculated to vilify a man and to bring him into hatred, contempt, and ridicule, an indictment lies. *Per Mansfield, C. J., Thorley* v. *Lord Kerry*, 4 *Taunt.* 364; *Digby* v. *Thompson*, 4 *B. & Ad.* 821. No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types or figures, the act by the law of England is a libel. *Per Lord Ellenborough, Cobbett's case, Holt on Lib.* 114, *2nd ed.* Thus an information was granted against Dr. Smollett for a libel in the 'Critical Review,' upon Admiral Knowles, insinuating that he wanted courage and veracity, and tending to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. *Smollett's case, Holt on Lib.* 224 (*n*). So an information was granted against the printer of a newspaper for a ludicrous paragraph, giving an account of the Earl of Clanricarde's marriage with an actress at Dublin, and of his appearing with her in the boxes with jewels, &c. *Kinnersley's case*, 1 *W. Bl.* 294. And for a libel on the Bishop of Durham, contained in a paragraph which represented him as "a bankrupt." *Anon. K. B. Hil. T.* 1819; *Holt on Lib.* 224 (*n.*), *2nd ed.*

It is extremely difficult to define the boundaries beyond which reflections upon the character of an individual are commonly cognizable. It is said by Mr. Holt, that where there is no imputation on the moral character, no words of ridicule or contempt, and nothing which can affect the party's reception in life, it is no libel; and he illustrates this position by the following case. The alleged libel was this: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." This libel was published in the Cassino-room at Southwold, by posting it on a paper. It was held, that the paper and mode of promulgating it did not amount to a libel: 1st, because it did not, by any necessary or probable implication, affect the moral fame of the party; 2ndly, that it was the regulation of a subscription assembly, and the paper might import no more than that the party was not a social and agreeable character in the intercourse of common life; 3rdly, that the words charged him with nothing definite, threw no blemish on his reputation, and implied no unfitness for general society. *Robinson* v. *Jermyn*, 1 *Price*, 11; *Holt on Libel*, 218, *2nd ed.*

In *Gregory* v. *Reg.* (*in error*), 15 *Q. B.* 957, the Court of Exchequer Chamber held the following words sufficient to maintain an indictment for libel: "Why should T. be surprised at any thing Mrs. W. does; if she chooses to entertain B. (the prosecutor) she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets, to her table if she thinks fit."

Wherever an action will lie for a libel without laying special damage, an indictment will also lie. Also, wherever an action will lie for verbal slander without laying special damage, an indictment will lie for the same words if reduced to writing and published. But the converse of this latter proposition will not hold good; for an action or indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. *Thorley* v. *Lord Kerry*, 4 *Taunt.* 355. As for instance, if a man write or print, and publish, of another that he is a scoundrel, *J'anson* v. *Stuart*, 1 *T. R.* 748, or villain, *Bell* v. *Stone*, 1 *B. & P.* 331; it is a libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. 2 *H. Bl.* 531. But no indictment will lie for mere words not reduced into writing, 2 *Salk.* 417; *Langley's case*, 6 *Mod.* 125; unless they be seditious, blasphemous, grossly immoral, or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge. *Archb.* 613, 4, 10*th ed.*

With regard to libels on the memory of persons deceased, it has been held, that a writing, reflecting on the memory of a dead person, not alleged to be published with a design to bring scandal or contempt on the family of the deceased, or to induce them to break the peace, is not punishable as a libel. *Topham's case*, 4 *T. R.* 127; and see *Taylor's case*, 3 *Salk.* 198; *Holt on Lib.* 230, 2*nd ed.*

A libel upon a foreigner is indictable. Thus Lord George Gordon was found guilty upon an information for a libel on the Queen of France; 2 *Stark. on Slander*, 217, 2*nd ed.*; and informations have also been granted for libels upon the characters of the Emperor of Russia, and of Napoleon. *Id.* In the latter case, Lord Ellenborough appears to have considered the situation of the individuals as forming the ground of the decision. "I lay it down as law," he says, "that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the amity and peace between the two countries."

It is not necessary that the libel should reflect upon the character of any particular individual, provided it immediately tend to produce tumult and disorder; 2 *Stark. on Slander*, 213, 2*nd ed.*; although the contrary was formerly held. *Hawk. P. C. b.* 1, *c.* 28, *s.* 9. Thus an information was granted for a libel, containing an account of a murder of a Jewish woman and child, by certain Jews lately arrived from Portugal; and the affidavits set forth, that certain persons recently arrived from Portugal had been attacked by the mob, and barbarously treated in consequence of the libel. *Osborne's case, Sess. Ca.* 260; *Barnard, K. B.* 138, 166.

Informations at the suit of public bodies upon the application of individuals presiding over them, have been frequently granted by the court of King's Bench. *Campbell's case, Bell's case, Holt on Lib.* 240, 2*nd ed.*; *Williams's case*, 5 *B. & A.* 595.

Punishment.] The punishment for a libel, at common law, was fine or imprisonment, or both.

But now, by the 6 & 7 Vict. c. 96 (E. & I.), an act to amend the law respecting defamatory words and libels, s. 3, "if any person shall publish, or threaten to publish, any libel upon any other person, or

shall, directly or indirectly, threaten to print or publish, or shall, directly or indirectly, propose to abstain from printing or publishing, or shall, directly or indirectly, offer to prevent the printing or publithing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: provided always, that nothing herein contained shall in any manner alter or affect any law now in force, in respect of the sending or delivery of threatening letters or writings."

By s. 4, "if any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, and to pay such fine as the court shall award."

By s. 5, "if any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year."

Proof of introductory averments.] Where the indictment contains introductory averments, inserted for the purpose of explaining and pointing the libel, such averments must be proved as laid. It frequently happens that the libel is directed against the prosecutor in a particular character, and an intent to libel him in that character is averred. In such case, it must be made to appear that the prosecutor bore that character. But in general, where the character is a public one, it will be sufficient if it appear that the prosecutor has acted in it, and it will not be necessary to give strict evidence of his appointment. Thus if the indictment allege that the prosecutor was, at the time of the supposed injury, a magistrate or a peace-officer, it is sufficient to show that he previously acted as such. *Berryman* v. *Wise*, 4 *T. R.* 366; 2 *Stark. on Slander*, 2, 2*nd ed.*

Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is, of course, the only evidence which the fact admits of. 2 *Stark. Ev.* 860, 1*st ed.*

Whether a person practising as a physician, and libelled in his character as such, was bound to prove, by strict evidence, the introductory averment that he was a physician, was long a matter of doubt. In a case at nisi prius, Buller, J., required such proof to be given; *Pickford* v. *Gutch*, 1787; 2 *Stark. on Slander*, 3 (*n.*), 2*nd ed.*; but in a subsequent case, the Court of Common Pleas was equally divided upon the point. *Smith* v. *Taylor*, 1 *N. R.* 196. It has, however, been decided by the Court of King's Bench, in a later case, that to support an averment that the party was a physician, it is necessary to give regular evidence that he possessed lawful authority to practise as such. *Collins* v. *Carnegie*, 1 *A. & E.* 695; 2 *Nev. & M.* 703.

In order to prove the prosecutor to be an attorney, an examined copy of the roll of attorneys, signed by the plaintiff, is sufficient. So the book from the master's office, containing the names of all the attorneys, produced by the officer in whose custody it is kept, is good evidence, together with proof that the party practised as an attorney

at the time of the offence. *Crossley's case*, 2 *Esp.* 526; *Lewis* v. *Walter*, 3 *B. & C.* 138; *Jones* v. *Stevens*, 11 *Price*, 1251. The stamp-office certificate, countersigned by the master of the Court of King's Bench, is sufficient *primâ facie* evidence of the party being an attorney of that court. *Sparling* v. *Heddon*, 9 *Bingh.* 11.

Where the indictment specifies the particular mode in which the party was invested with the particular character in which he has been injured, it will, as it seems, be necessary to prove such a descriptive allegation with all its circumstances, although a more general allegation would have been sufficient; for though a totally irrelevant allegation may be regarded as surplusage, one which is material and descriptive of the legal injury must be proved as laid. 2 *Stark. on Slander*, 8, 2*nd ed.*

In all cases where the libel itself is an admission of the particular character alleged, further proof of such particular character is unnecessary. Thus where, in an action for words spoken of the plaintiff as an attorney, it appearing that they contained a threat to have the plaintiff struck off the roll of attorneys, it was held unnecessary to give any proof of the plaintiff's professional character. *Berryman* v. *Wyse*, 4 *T. R.* 366. So where the words were, "He is a pettifogging, blood-sucking attorney." *Armstrong* v. *Jordan*, *cor. Hullock*, *Stark. on Slander*, 11 (*n*), 2*nd ed.* Where the declaration alleged that the plaintiff held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, and the alleged libel treated the plaintiff as holding an office of public trust, and charged him with not having given a proper account of the public property, the libel itself was held to be evidence of the introductory averment, though the plaintiff's own witnesses proved that the office was *not* one of trust and confidence, and that he was not trusted with the receipt of money. *Baynall* v. *Underwood*, 11 *Price*, 621.

In the same manner, where the libel admits any other of the introductory averments, such averments need not be proved. Where the declaration averred that the plaintiff had been appointed envoy by certain persons exercising the powers of government in the republic or State of Chili, in South America, the libel, stating that the plaintiff had colluded to obtain money in the matter of a loan for the republic or state of Chili, was held to be sufficient proof of the existence of such a state. *Yrisarri* v. *Clement*, 3 *Bingh.* 432. So where a libel alleged that certain acts of outrage had been committed, and there was a similar introductory averment, it was held that the latter required no proof. *Sutton's case*, 4 *M. & S.* 548.

If an introductory averment be immaterial, it may be rejected as surplusage, and need not be proved; and, in general, where it is not matter of description, it is divisible, and part of it only may be proved.

The averment that the libel was published "of and concerning" the prosecutor, or "of and concerning" the particular matters averred, must be proved as laid.

The declarations of spectators, while viewing a libellous picture, publicly exhibited in an exhibition room, were admitted by Lord Ellenborough as evidence to show that the figures portrayed were meant to represent the parties alleged to have been libelled. *Dubois* v. *Beresford*, 2 *Campb.* 512.

Proof of publication—in general.] All who are concerned in publishing a libel are equally guilty of a misdemeanor; *Bac. Ab. Libel*

(*B.*), 1 *Russ. by Grea.* 248; but the writing or composing of a libel, without a publication of it, is not an offence. The mere writing of a defamatory libel, which the party confines to his own closet, and neither circulates nor reads to others, is not punishable. *Paine's case*, 5 *Mod.* 165, 167. So the taking a copy of a libel is not an offence, unless the person taking the copy publishes it. *Com. Dig. Libel* (*B.* 2).

The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as fact, and it is a question for the court in doubtful cases, whether the facts, when proved, constitute a publication in point of law. 2 *Stark. on Slander*, 311, *2nd ed.*

With regard to the acts which constitute a publication, it has been held, that a man who acts as servant to the printer of the libel, and claps down the press, is punishable, though it do not appear that he clearly knew the import of the libel, or that he was conscious he was doing anything wrong. *Clark's case*, 1 *Barnard*, 304. To this decision, however, Mr. Serjeant Russell has, with much reason, added a *quære*. 1 *Russ.* 234. Production of a libel, and proof that it is in the handwriting of the defendant, afford a strong presumption that he published it. *Beare's case*, 1 *Lord Raym.* 427. So if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant. *R.* v. *Lovett*, 9 *C. & P.* 243. But the defendant may show that the publication was without his authority or knowledge, see *post*, p. 648. So printing a libel, unless qualified by circumstances, will, *primâ facie*, be understood to be a publishing, for it must be delivered to the compositor and the other subordinate workmen. *Per cur. Baldwin* v. *Elphinstone*, 2 *W. Bl.* 1038. A delivery of a newspaper (containing a libel), according to the provisions of the 38 Geo. 3, c. 78, to the officer of the stamp-office, has been held a publication, though such delivery was directed by the statute, for the officer had an opportunity of reading the libel. *Amphlitt's case*, 4 *B. & C.* 35; see also *Cook* v. *Ward*, 6 *Bingh.* 408. If a letter containing a libel have the post-mark upon it, that is *primâ facie* evidence of its having been published. *Warren* v. *Warren*, 1 *C., M. & R.* 360; 4 *Tyr.* 850; *Shipley* v. *Todhunter*, 7 *C. & P.* 680. It is said by Mr. Justice Fortescue, to have been ruled that the finding of a libel on a bookseller's shelf is a publication of it by the bookseller. *Dodd's case*, 2 *Sess. Ca.* 33; *Holt's L. of L.* 284, *2nd ed.* The reading of a libel in the presence of another, without knowing it to be a libel, with or without malice, does not amount to a publication. 4 *Bac. Ab.* 458; *Holt's L. of L.* 282, *2nd ed.* But if a person, who has either read a libel himself, or heard it read by another, afterwards maliciously reads or repeats any part of it to another, he is guilty of an unlawful publication of it. *Hawk. P. C. b.* 2, *c.* 73, *s.* 10.

Although, in civil cases, publication of a libel to the party libelled only is not sufficient to support an action, yet in criminal cases such publication will maintain an indictment or information. *Hawk. P.C. b.* 1, *c.* 73, *s.* 11; 1 *Russ. by Grea.* 250 (*n*); *Wegener's case*, 2 *Stark. N. P. C.* 245. But such publication must be alleged to have been sent, with intent to provoke the prosecutor to a breach of the peace,

and not with intent to injure him in his profession, &c. *Wegener's case, supra.*

Where the libel is in a foreign language, and it is set out in the indictment, both in the original and in a translation, the translation must be proved to be correct. In a case of this kind, an interpreter being called, read the whole of that which was charged to be a libel in the original, and then the translation was read by the clerk at nisi prius. *Peltier's case, Selw. N. P.* 917.

Where the libel has been printed by the directions of the defendant, and he has taken away some of the impressions, a copy of those left with the printer may be read in evidence. *Watson's case*, 2 *Stark. N. P. C.* 129, *ante*, p. 4. In order to show that the defendant had caused a libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor, the contents of which had been communicated by the defendant for the purpose of publication; and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held, that what the report published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the reporter to the editor. *Adams* v. *Kelly*, *Ry. & Moo. N. P. C.* 157; and see *Ry.* v. *Cooper*, 8 *Q. B.* 533; *S. C.* 15 *L. J. Q. B.* 206; and *Fryer* v. *Gathercole*, 4 *Ex.* 262; *S. C.* 18 *L. J. Ex.* 389.

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy, will be no bar to an indictment for publishing another copy. *Carlile's case*, 1 *Chitty*, 451; 2 *Stark. on Slander*, 320, 2*nd ed.*

Proof of publication—of libels contained in newspapers.] The proof of the publication of libels contained in newspapers was facilitated by the 38 Geo. 3, c. 78, but that act has been repealed by the 6 & 7 Wm. 4, c. 76 (U. K.), and provisions of a similar nature substituted.

By s. 6 of the recent statute, before any newspaper shall be printed, a declaration in writing shall be delivered at the stamp-office, made and signed by the printer or publisher and proprietors of such newspaper as therein directed, which declaration shall set forth the title of the newspaper, and of the house or building wherein it is intended to be published; and also the name, addition, and place of abode of the printer and publisher thereof, and of the proprietors, if they, exclusive of the printer and publisher, do not exceed two, and if they do, then of two proprietors resident in the united kingdom, and their proportional shares. On a change of ownership, a fresh declaration is to be made, and every person knowingly or wilfully making a false or defective declaration shall, on conviction, be deemed guilty of a misdemeanor.

By s. 7, persons printing or publishing, or selling or delivering out any newspaper before such declaration is made, shall forfeit 50*l.* a day.

By s. 8, "all such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and copies thereof, certified to be true copies as by this act is directed, shall respectively be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever,

touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners, or to such officer as aforesaid, or unless it shall be proved that previous to such occasion as aforesaid a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid, respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorised officer by whom any such declaration shall be kept according to the directions of this act, shall, upon application in writing made to them or him respectively by any person requiring a copy, certified according to this act, of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy, or cause the same to be delivered to the person applying for the same, upon payment of the sum of one shilling, and no more; and in all proceedings and upon all occasions whatsoever a copy of any such declaration certified to be a true copy, under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any and every person named in such declaration as a person making or signing the same as sufficient proof of such declaration, and that the same was duly signed and made according to this act, and of the contents thereof; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration of which the copy so produced and certified shall purport to be a copy had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid, against any person having signed and made such declaration, and a newspaper shall afterwards be produced in evidence, intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher, and the place of printing shall be the same as the name of the printer and publisher, and the place of printing mentioned in such declaration, or shall purport to be the same whether such title, name and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, informant, or prosecutor in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate was

purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold; and if any person, not being one of the said commissioners, or the proper authorised officer, shall give any certificate purporting to be such certificate as aforesaid, or shall presume to certify any of the matters or things by this act directed to be certified by such commissioner or officer, or which such commissioner or officer is hereby empowered or intrusted to certify; or if any such commissioner or officer shall knowingly and wilfully falsely certify, under his hand, that any such declaration as is required to be made by this act was duly signed and made before him, the same not having been so signed and made, or shall knowingly and wilfully falsely certify that any copy of any declaration is a true copy of the declaration of which the same is certified to be such copy, the same not being such true copy, every person so offending shall forfeit the sum of one hundred pounds."

By sec. 9, service of legal process, either in civil or criminal suits, at the place of printing or publishing mentioned in the declaration shall be deemed sufficient service.

By sec. 10, titles of newspapers and names of printers and publishers are to be entered in a book at the stamp-office, and persons shall have liberty to inspect it.

Since the passing of the 38 Geo. 3, c. 78, the production of a certified copy of the affidavit and of a newspaper corresponding in the title and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, has been sufficient evidence of publication. *Mayne* v. *Fletcher*, 9 *B. & C.* 382; *R.* v. *Hunt*, 31 *State Trials*, 375. But where the affidavit and the newspapers vary in the place of residence of the party, *Murray* v. *Souter*, *cited* 6 *Bing.* 414, or in the name of the printing place, *Francey's case*, 2 *A. & E.* 49, it is insufficient. See as to what is sufficient evidence of the identity of the newspaper under the 6 & 7 Wm. 4, c. 176, s. 8; *Baker* v. *Wilkinson*, *Carr. & M.* 399; see also *R.* v. *Woolmer*, 12 *A. & E.* 422; *Duke of Brunswick* v. *Harmer*, 3 *C. & K.* 10; and *Gathercole* v. *Miall*, 15 *M. & W.* 319.

The purchase of a copy of the newspaper at the office many years after the date of the libel has been held to be sufficient proof of publication. *Duke of Brunswick* v. *Harmer*, 14 *Q. B.* 110; *S. C.* 19 *L. J. Q. B.* 20.

The statute has been held to apply to motions for criminal informations. *Donnison's case*, 4 *B. & Ad.* 698; *Francey's case, supra.* A newspaper may be given in evidence, though it is not one of the copies published, and though it be unstamped. *Pearce's case, Peake*, 75.

Proof of publication—by admission of the defendant.] On an information for a libel, the witness who produced it stated that he showed it to the defendant, who admitted that he was the author of it, errors of the press and some small variances only excepted. It was objected, that this evidence did not entitle the prosecutor to read the book, the admission not being absolute; but Pratt, C. J., allowed it to be read, and said that he would put it to the defendant to prove material variances. *Hall's case*, 1 *Str.* 416. An admission of the signature to a libel is no admission of its having been published in a particular county. *Case of the Seven Bishops*, 12 *How. St. Tr.* 183. An admission of being the publisher of a periodical work cannot be

extended beyond the date of such admission. *M'Leod* v. *Wakley*, 3 *C. & P.* 311.

Publication—constructive publication.] It is now well established, that, in order to render a party guilty of publishing a libel, it is not necessary that he should be the actual publisher of it, or that he should even have a knowledge of the publication; not only is a person who procures another to publish a libel, himself guilty of the offence, *Hawk. P. C. b.* 1, *c.* 73, *s.* 10, but a bookseller or publisher, whose servant publishes a libel, is criminally answerable for that act, though it was done without his knowledge. This rule, which is an exception to those which govern the other branches of criminal law, appears to be founded upon a principle of policy, and to have been arbitrarily adopted with the view of rendering publishers cautious with regard to the matters to which they give general circulation. The leading case on this subject is that of *Almon's case*, 5 *Burr.* 2689. The defendant, a bookseller, was convicted of publishing a libel in a magazine. The proof of the publication was, that the magazine was bought at his shop. A new trial was moved for, on the ground that the libel had been sent to the defendant's shop, and sold there by a boy, without his knowledge, privity, or approbation; but the court were clear and unanimous in their opinion, that this libel, being bought in the shop of a *common known bookseller and publisher*, importing, by its title-page, to be printed by him, was a sufficient *primâ facie* evidence of its being published by him,—not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. The court regarded the matters urged as grounds for a new trial, merely as an extenuation of the offence. So Lord Kenyon ruled, that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting the paper; adding, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster; that it was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libels. *Walter's case*, 3 *Esp.* 21. And the same rule was laid down by Lord Ellenborough. *Cuthell's case*, *White's case*, *Holt, Law of Libel*, 287; 2 *Stark. on Slander*, 33, 2*nd ed.* In a later case, where it was urged that the rule respecting the liability of publishers in libel, was contrary to the principle which prevails in all other criminal cases, Lord Tenterden said, "The rule seems to me to be conformable to principle and to common sense. Surely a person who derives profit from, and who furnishes the means of carrying on the concern, and intrusts the conduct of the publication to one whom he selects and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether." *Gutch's case*, *Moo. & M.* 433.

It does not appear to be well settled whether a publisher by whose servant a libel has been sold, may exonerate himself from the consequences of that act, by showing that he has himself in no way been accessary to the publication. If the libellous work has been sold by the servant in the regular performance of his duty towards his em-

ployer, the latter would, as it seems, still be answerable, although he should prove that in fact he was absent from the shop at the time, and that he was wholly ignorant of the contents of the book, and innocent of any intent to disseminate the libel. *Dodd's case*, 2 *Sess. Ca.* 33. If, on the contrary, the book was not sold by the servant in the ordinary course of his employment, but clandestinely brought by him to his master's shop, and vended there, in such case the master would not, as it seems, be guilty of the publication. In *Almon's case*, *ante*, p. 648, the court appear to have treated the publication by the servant as presumptive evidence only of a publication as against the master, who would be entitled to rebut such presumption; and in one case it seems to have been decided that if a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him. *Woodfall's case*, *Essay on Libels*, 18. See also *Salmon's case*, *B. R. H. T.* 1777; *Hawk. P. C. b.* 1, *c.* 73, *s.* 10 (*n*), 7*th ed.* The defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely, or that some deceit or surprise was practised upon him, or that he was absent under circumstances which entirely negative any presumption of privity or connivance. 2 *Starkie on Slander*, 34, 2*nd ed.* See the 6 & 7 Vict. c. 96, s. 7, *post*, p. 654.

Where the libel is published by an agent of the defendant, the authority of such agent must be strictly proved. In the case of booksellers and publishers, proof that the party actually vending the libel was a servant in the way of their business, is sufficient, for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where it appeared that the libel in question was in the hand-writing of the defendant's daughter, who was usually employed by him to write his letters of business, but there was no evidence that the defendant had authorised her to write this particular document, it was held to be no evidence of publication as against him. *Harding* v. *Greening*, 1 *B. Moore*, 477.

Proof of innuendos.] Where, in order to bring out the libellous sense of the words, innuendos are inserted in the indictment, they must, if material, be proved by witnesses acquainted with the parties, and with the transaction to be explained. It is sufficient if such witnesses speak in the first instance as to their belief with regard to the intended application of the words; the grounds of such belief may be inquired into on cross-examination. 2 *Stark. on Slander*, 51, 2*nd ed.* If the witness derives his conclusion from the terms of another libel, with the publication of which the defendant is not connected, this is not sufficient. *Bourke* v. *Warren*, 2 *C. & P.* 307. If a good innuendo, ascribing a particular meaning to certain words, is not supported in evidence, the party will not be permitted to ascribe another meaning to those words. *Williams* v. *Stott*, 1 *Crom. & M.* 675; *Archbishop of Tuam* v. *Robinson*, 5 *Bingh.* 17; but see *Harvey* v. *French*, 1 *Crom. & M.* 11. Thus, where the words in fact imputed either a fraud or a felony, but by the innuendo were confined to the latter, Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. *Smith* v. *Carey*, 3 *Campb.* 461. If a libel contains blanks, the jury ought to acquit the defendant, unless they are satisfied that those blanks are filled up in the indictment according to the sense and meaning of the writer. *Per Lord Mansfield*, *Almon's case*, 5 *Burr.* 2686. It is said by

Tindal, C. J., that where words spoken impart in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. *Day* v. *Robinson*, 1 *A.* & *E.* 558; see also *Williams* v. *Gardiner*, *Tyr.* & *G.* 578; 1 *M.* & *W.* 245; *West* v. *Smith*, *Tyr.* & *G.* 825. And see *Hoare* v. *Silverlocke*, 12 *Q. B.* 625.

Proof of malice.] Where a man publishes a writing, which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstances from which malice may be inferred. Thus, in *Harvey's case*, it was said by Lord Tenterden, that a person who publishes what is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. *Harvey's case*, 2 *B.* & *C.* 257; *Burdett's case*, 4 *B.* & *A.* 95. In such case, it is incumbent upon the defendant, if he seeks to discharge himself from the consequences of the publication, to show that it was made under circumstances which justify it.

It is, however, frequently necessary, upon prosecutions for libel, where the expressions are ambiguous, or the intentions of the defendant doubtful, to adduce evidence for the purpose of showing the malice which prompted the act of publication. Thus, where the occasion of the publication would, *primâ facie*, justify the defendant, yet, if the libel be false and malicious, it is an offence; in such case, evidence of the malice must be given on the part of the prosecution to rebut the presumed justification. Where the material question,' says Mr. Starkie, is whether the defendant was justified by the occasion, or acted from express malice, it seems in principle, that any circumstances are admissible, which can elucidate the transaction, and enable the jury correctly to conclude whether the defendant acted fairly and honestly, or *malâ fide*, and vindictively for the purpose of causing evil consequences. 2 *Stark. on Slander*, 55, 2*nd ed.* Upon this principle, in an action for libel contained in a weekly paper, evidence was allowed to be given of the sale of other papers, with the same title, at the same office, for the purpose of showing that the papers were sold deliberately, and in the regular course of circulation, and vended in regular transmission for public perusal. *Plunkett* v. *Cobbett*, 5 *Esp.* 136. So where on the trial of an action for libel contained in a newspaper, *subsequent* publications by the defendant in the same paper were tendered in evidence, to show *quo animo* the defendant published the libel in question, Lord Ellenborough said, no doubt they would be admissible in the case of an indictment. *Stuart* v. *Lovell*, 2 *Stark. N. P. C.* 93. Again, in the trial of an action against the editor of a monthly publication for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff. *Chubb* v. *Westley*, 6 *C.* & *P.* 436. In *Barrett* v. *Long* (*in error*), 3 *H. of L. Cas.* 395, other publications of the defendant, going back more than six years before the publication complained of, were held to be admissible to prove malice. So it was held by Lord Ellenborough, that any words or any act of the defendant are admissible, in order to show *quo animo* he spoke the words which are the subject of the action. *Rustel* v. *Macquister*, 1 *Campb.* 49.

So either the prosecutor or the defendant is entitled to have extracts read from different parts of the same paper or book which contains the libel, relating to the same subject. *Lambert's case*, 2 *Campb.* 398.

When the publication is *primâ facie* excusable, on account of the cause of writing it, as in the case of servants' characters, or confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved. *Per Bayley, J.*, *Bromage* v. *Prosser*, 4 *B. & C.* 256; and see *M'Pherson* v. *Daniels*, 10 *B. & C.* 272. "Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter, or prove express malice." *Per Parke, B.*, *Wright* v. *Woodgate*, *Tyr. & G.* 15.

Proof of intent.] Where the malicious intent of the defendant is, by averment in the indictment, pointed to a particular individual, or to a particular act or offence, the averment must be proved as laid. Thus where the indictment alleged a publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney, it was held that proof of a publication to the prosecutor only did not maintain the indictment, and that the intent ought to have been averred, to provoke the prosecutor to a breach of the peace. *R.* v. *Wegener*, 1 *Stark. N. P.* 245. The allegation of intent is divisible, *ante*, p. 97.

Venue.] The libel must be proved to have been published in the county in which the venue is laid. Where the libel is once published, the party is guilty of a publication in every county in which such libel is afterwards published. *Johnson's case*, 7 *East*, 65, *B. N. P.* 6. So if he sent it to be printed in London, it is his act if the publication is there. Upon an information for a libel, in the county of Leicester, it appeared that it was written in that county, and delivered to a person who delivered it to B. (who was not called) in Middlesex. It was inclosed in an envelope, but there was no trace of a seal. The judge directed the jury, that as B. had it open, they might presume that he received it open, and that as the defendant wrote it in the county of Leicester, it might be presumed that he received it in that county. The defendant having been found guilty, it was urged on a motion for a new trial, that there was no evidence of a publication in Leicestershire; but the Court of King's Bench (*diss.* Bayley, J.,) held that the direction of the judge was proper, and that if the delivery open could not be presumed, a delivery sealed, with a view to and for the purpose of publication, was a publication: and they held that there was sufficient to presume some delivery, either open or sealed, in the county of Leicester. *Burdett's case*, 4 *B. & A.* 95. In the above case the question was discussed, whether it was essential that the whole offence should be proved to have been committed in the county in which the venue was laid. Holroyd, J., expressed an opinion that the composing and writing a libel in the county of L., and afterwards publishing it, though that publication was not in L., was an offence which gave jurisdiction to a jury of the county of L., (*Beer's case*, 2 *Salk.* 417; *Carth.* 409; *Knell's case*, *Barnard*, *K. B.* 305,) and that the composing and writing with intent afterwards to publish, was a misdemeanor; but Bayley J., held that the whole *corpus delicti* must be proved within one county, and that there was no distinction in this respect between felonies and misdemeanors. Abbott, J., said,

that as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L., where one of those acts had been done.

The post-marks upon letters (proved to be such) are evidence that the letters which bear them were in the offices to which the post-marks belong at the times denoted by the marks. *Plumer's case, Russ. & Ry.* 264. But the mark of double postage having been paid is not, of itself, proof that the letter contained an inclosure. *Id.*

Proof of a newspaper under the requisitions of the statute 38 Geo. 3, c. 78, *ante*, p. 645, was held to be proof that the paper was published in the county where the printing is described to be. *Hart's case*, 10 *East*, 94.

A letter containing a libel was proved to be in the handwriting of A., to have been addressed to a party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded to London to be forwarded to Scotland. It was produced at the trial, with the proper post-mark, and with the seal broken. This was held to be sufficient evidence of the letter having reached the person to whom it was addressed, and of its having been published to him. *Warren* v. *Warren*, 1 *C., M. & R.* 250; 4 *Tyr.* 850.

Proof for the defendant.] As the offence of publishing a libel consists in the *malicious* publication of it, which, as already stated, is in general inferred from the words of the alleged libel itself, it is competent to the defendant, in all cases, to show the absence of malice on his part. He cannot, it is true, give in evidence matter of justification, that is to say, he cannot admit the publication to be malicious, and then rely for his defence upon circumstances which show that he was justified, however malicious the libel may be; but he is not precluded from giving evidence of those circumstances which tend to prove that the original publication of the libel was without malice. It may, perhaps, be laid down as a rule, that the matters which might be given in evidence under the general issue in an action, in order to disprove malice, are also admissible for the same purpose upon the trial of an indictment or information.

The defendant may, therefore, show that the publication was merely accidental, and without his knowledge, as where he delivers one paper instead of another, or delivers a letter without knowing its contents. *Topham's case*, 4 *T. R.* 127, 128; *Nutt's case*, *Fitzg.* 47; *Lord Abingdon's case*, 1 *Esp.* 226. See also *Day* v. *Bream*, 2 *Moo. & R.* 54, where Patteson, J., held that a porter who in the course of his business delivered parcels containing libellous handbills, was not liable in an action for libel, if he were shown to be ignorant of the contents of the parcels. See the 6 & 7 Vict. c. 96, s, 7, *post*, p. 654.

So the defendant, under the plea of not guilty to the indictment, may show that the libel was published under circumstances which the law recognises as constituting either an absolute justification or excuse, independently of the question of intention, or a qualified justification dependent on the actual intention and motive of the defendant. 2 *Stark. on Sland.* 308, 2*nd ed.* Thus the defendant may show that the alleged libel was presented *bonâ fide* to the king as a petition for the redress of grievances; *Case of the Seven Bishops*, 12 *St. Tr.* 183; or to parliament; *Hawk. P. C. b.* 2, *c.* 73, *s.* 8; or that it was contained in articles of the peace exhibited to a magistrate, or in any other pro-

ceeding in a regular course of justice. *Ibid.* It seems, says Hawkins, to have been held by some, that no want of jurisdiction in the court to which such a complaint is exhibited will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel; yet if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, commenced, not with a design to go through with it, but only to expose the defendant's character under the show of legal proceeding, it would form a ground for an indictment at the suit of the king, as the malice of the proceeding would be a good foundation for an action on the case at the suit of the party. *Ibid.*

Though it is a defence to show that the alleged libel was published by a person in a privileged capacity, as by a member of parliament in his place, or by some person in the course of a judicial proceeding, yet if it appear that the publication took place by the party, when not invested with that privileged capacity, or by a third person, who has never been invested with it, it furnishes no defence. Thus a member of parliament, who after delivering his speech in parliament, publishes it, is criminally responsible for the libel; *Creevy's case*, 1 *M. & S.* 281; though by act of parliament, the members are protected from all charges against them for anything said in either house. 1 *W. & M. st.* 2, *c.* 2.

So it has been recently held by the Court of Queen's Bench, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by the defendants; and that the House of Commons heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it." On the demurrer to a plea suggesting such a defence, it was also held, that a court of law is competent to determine whether or not the House of Commons has such privilege as will support the plea. *Stockdale* v. *Hansard*, 9 *A. & E.* 1. It will, upon the same principle, be a defence to show that the supposed libel was written *bonâ fide*, with the view of investigating a fact in which the party is interested, provided the limits necessary for effectuating such inquiry are not exceeded. *Delany* v. *Jones*, 4 *Esp.* 191; *Finden* v. *Westlake*, *Moo. & Malk.* 461; *Brown* v. *Croome*, 2 *Stark. N. P. C.* 297. So where the libel was an advertisement for the discovery of the plaintiff, an absconding debtor, published at the request of a party who had sued out a *capias*, for the purpose of enabling the sheriff to take him. *Lay* v. *Lawson*, 4 *A. & E.* 795. So the showing of a libel to the person reflected on, with the *bonâ fide* intention of giving him an opportunity for making an explanation, or with a friendly intention to enable him to exculpate himself, or seek his legal remedy, is no offence. 2 *Stark. on Slander*, 249, 2*nd ed.*; *B. N. P. C.* 8; *M'Dougall* v. *Claridge*, 1 *Campb.* 267. And the same with regard to a letter of friendly advice. *Id.* Thus a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice be shown. *Todd* v. *Hawkins*, 2 *Moo. & R.* 20. But an unnecessary publicity

would render such a communication libellous, as if the letter were published in a newspaper. *Knight's case, Bac. Ab. Libel, (A. 2.)* So a representation made *bonâ fide* by the defendant to a public officer respecting the conduct of a plaintiff, a person acting under him, is not *primâ facie* actionable. *Blake* v. *Pilfold*, 1 *Moo. & R.* 198. So a letter to the postmaster-general, complaining of misconduct in a postmaster, is not libellous, if it contains a *bonâ fide* complaint. *Woodward* v. *Lander*, 6 *C. & P.* 548. See also *Hopwood* v. *Thom*, 8 *C. B.* 293. *Harrison* v. *Bush*, 25 *L. J. Q. B.* 25. *Cooke* v. *Wildes*, 1 *Jur. N. S.* 610. Upon the same principle the defendant may show that the supposed libel was written *bonâ fide* for the purpose of giving the character of a servant. *Edmonson* v. *Stephenson*, *B. N. P.* 8; *Weatherstone* v. *Hawkins*, 1 *T. R.* 110; *Pattison* v. *Jones*, 8 *B. & C.* 578; *Child* v. *Affleck*, 9 *B. & C.* 403; *Somerville* v. *Hawkins*, 10 *C. B.* 583; *Taylor* v. *Hawkins*, 16 *Q. B.* 308, and *Harris* v. *Thompson*, 13 *C. B.* 33.

How far the publication of the proceedings of a court of justice correctly given, containing a libel upon the character of an individual, and published by a third person not connected with the proceedings, and without any justification for the act, is criminally punishable, does not appear to be satisfactorily settled. See *Curry* v. *Walter*, 1 *Esp.* 456; 1 *B. & P.* 525; *Wright's case*, 8 *T. R.* 298; *Stiles* v. *Noakes*, 7 *East*, 504; *Fisher's case*, 2 *Campb.* 563; *Lewis* v. *Clement*, 3 *B. & A.* 702; *Lewis* v. *Walter*, 4 *B. & A.* 613; *Duncan* v. *Thwaites*, 3 *B. & C.* 583; *Flint* v. *Pike*, 4 *B. & C.* 476, 481; *Roberts* v. *Brown*, 10 *Bing.* 523; *Hoare* v. *Silverlock*, 9 *C. B.* 20. It is, however, decided, that the publication of preliminary or *ex parte* proceedings in a court of justice, cannot be justified, as the publication of depositions before a justice of the peace on a charge of murder; *Lee's case*, 5 *Esp.* 123; or the proceedings of a coroner's inquest, *Fleet's case*, 1 *B. & A.* 379; or proceedings before a corporation commissioner, *Charlton* v. *Watton*, 6 *C. & P.* 385.

And the conduct and management by the clergyman of a parish, of a charitable society in a parish, from the benefit of which dissenters are by his sanction excluded, is not lawful subject of public comment so as to excuse a libellous publication respecting it. *Gathercole* v. *Miall*, 15 *M. & W.* 319; *S. C.* 15 *L. J. Ex.* 179. So where, on showing cause against a rule for a criminal information, for publishing a blasphemous and seditious libel, it was urged that it was merely the report of a judicial proceeding; yet the court held, that if the statement contained anything blasphemous, seditious, indecent, or defamatory, the defendant had no right to publish it, though it had actually taken place in a court of justice. *Carlile's case*, 3 *B. & A.* 167. Where a libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates; Patteson, J., held, that on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of showing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot, and that a pistol was fired at the people. *Brigstock's case*, 7 *C. & P.* 184.

Before the 6 & 7 Vict. c. 96 (E. & I.), the defendant was not allowed upon an indictment to give evidence of the truth of the libel; but now by s. 6 of that statute, "on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may

be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea of justification: provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel."

Where a defendant in an information for libel pleads the truth of the charges under this section, evidence is not admissible in support of the plea that the same charges had been previously published within the knowledge of the prosecutor, and that he had not taken legal proceedings against the publisher. *Newman's case*, 1 *Ell. & Bl.* 268; *S. C.* 22 *L. J. Q. B.* 156. In the same case it was decided, that upon a general replication to such plea the defendant is bound to prove the truth of all the material allegations contained in it, and if he fail to do so, it is no ground for a new trial that, with respect to some of those upon which the jury gave a verdict against him, their finding was against the weight of the evidence; but the court, in pronouncing sentence, will consider the evidence on both sides, and form their own conclusion, "whether the guilt of the defendant is aggravated or mitigated by the plea and by the evidence given to prove or disprove the same." Affidavits, showing the grounds upon which the defendant proceeded in pleading, are receivable in mitigation of punishment.

This section does not apply to seditious libels. *Duffy's case*, 2 *Cox, C. L. C.* 45.

Where the plea of justification stated that the prosecutor had earned the reputation of a scandalous friar, a witness called on behalf of the defendant in support of the plea, was allowed to be asked on cross-examination as to the prosecutor's moral character. *Newman's case*, 3 *C. & K.* 252.

By s. 7, "whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent,

or knowledge, and that the said publication did not arise from want of due care or caution on his part."

By s. 8, "in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried."

Under the 8th sect., if judgment be given for the defendant, he is entitled to recover from the prosecutor, the costs sustained by reason of the indictment or information, although the only plea is not guilty, and the judge certifies under sec. 2 of the 4 & 5 W. & M. c. 18, that there was reasonable cause for preferring the same. *R.* v. *Latimer*, 15 *Q. B.* 1077; *S. C.* 20 *L. J. Q. B.* 129.

Statute 32 *Geo.* 3, *c.* 60.] By Mr. Fox's act (the 32 Geo. 3, c. 60), reciting that doubts had arisen whether, on the trial of an indictment or information for the making or publishing of a libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same, to give their verdict upon the whole matter put in issue, it is (by sec. 1) *declared* and enacted, that on every such trial the jury sworn to try the issue, may give a general verdict of not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication, by such defendant or defendants, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By sec. 2 it is provided, that on every such trial the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion or discretion to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases. By sec. 3 it is provided, that nothing in the act contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases. And by sec. 4, in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the defendant or defendants to move an arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of the act.

MAINTENANCE, &c.

MAINTENANCE, CHAMPERTY, AND EMBRACERY.

Maintenance—nature of the offence.] MAINTENANCE signifies an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. *Hawk. P. C. b.* 1, *c.* 83, *s.* 1. It may be either with regard to matters in suit, or to matters not in legal controversy. *Id. s.* 2. It is an offence punishable at common law with fine and imprisonment, and is forbidden by various statutes. 1 Ed. 3, st. 2, c. 14; 20 Ed. 3, c. 4; 1 R. 2, c. 4; 32 Hen. 8, c. 9, s. 3. These acts, however, are only declaratory of the common law, with additional penalties. *Pechell* v. *Watson*, 8 *M. & W.* 691.

According to the old authorities, whoever assists another with money to carry on his cause, or retains one to be of counsel for him, or otherwise bears him out in the whole or any part of his suit, or by his friendship or interest saves him that expense which he might be otherwise put to, or gives evidence without being called upon to do so, or speaks in another's cause, or retains an attorney for him, or being of great power and interest says publicly that he will spend money to labour the jury, or stand by the party while his cause is tried, this is maintenance. *Hawk. P. C. b.* 1, *c.* 83, *ss.* 5, 6, 7. It may be doubted, however, whether, at the present day, some of these acts would be held to amount to an indictable offence, unless they were plainly accompanied with a corrupt motive. A bare promise to maintain another is not in itself maintenance, unless it be so in respect of the public manner in which, or the power of the person by whom, it is made. *Hawk. P. C. b.* 1, *c.* 83, *s.* 8. So the mere giving of friendly advice, as what action it will be proper to bring to recover a certain debt, will not amount to maintenance. *Ibid. s.* 11.

Maintenance—justifiable—in respect of interest.] Those who have a certain interest, or even bare contingent interest, in the matter in variance, may maintain another in an action concerning such matter; as in the case of landlord and tenant, trustee and *cestui que trust.*

Hawk. P. C. b. 1, *c.* 83, *ss.* 19, 20, 21. So where A. at the request of B. defended an action brought for the recovery of a sum of money in which B. claimed an interest, upon B. undertaking to indemnify him from the consequences of such action, this was held not to be maintenance. *Williamson* v. *Henley*, 6 *Bingh.* 299. So wherever persons claim a common interest in the same thing, as in a way, common, &c., by the same title, they may maintain one another in a suit relating to the same. *Hawk. P. C. b.* 1, *c.* 83, *s.* 24.

Maintenance—justifiable—master and servant.] A master may go with his servant to retain counsel, or to the trial and stand by him, but ought not to speak for him; or if arrested, may assist him with money. *Hawk. P. C. b.* 1, *c.* 83, *ss.* 31, 32. So a servant may go to counsel on behalf of his master, or show his evidences, but cannot lawfully lay out his own money to assist his master. *Ibid. s.* 34.

Maintenance—justifiable—affinity.] Whoever is in any way of kin or affinity to either of the parties, may stand by him at the bar, and counsel or assist him; but unless he be either father or son, or heir-apparent, or the husband of such an heiress, he cannot justify laying out money in his cause. *Hawk. P. C. b.* 1, *c.* 83, *s.* 26.

Maintenance—justifiable—poverty.] Any one may lawfully give money to a poor man, to enable him to carry on his suit. *Hawk. P. C. b.* 1, *c.* 83, *s.* 36.

Maintenance—justifiable—counsel and attorneys.] Another exception to the general rule with regard to maintenance is the case of counsel and attorneys. But no counsel or attorney can justify the using of any deceitful practice in the maintenance of a client's cause, and they are liable to be severely punished for any misdemeanors of this kind. *Hawk. P. C. b.* 1, *c.* 83, *s.* 31. And by stat. West. 1, c. 29, if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent to it, in deceit of the court, or to beguile the court or the party, he shall be imprisoned for a year and a day. Procuring an attorney to appear for a man, and to confess judgment without a warrant, has been held within this statute. *Hawk. P. C. b.* 1, *c.* 83, *s.* 36. So bringing a *præcipe* against a poor man, knowing he has nothing in the land, on purpose to get the possession from the true tenant. *Ibid. s.* 35.

Champerty.] Champerty is a species of maintenance, accompanied by a bargain to divide the matter sued for between the parties, whereupon the champertor is to carry on the suit at his own expense. 4 *Bl. Com.* 135; 1 *Russ. by Grea.* 179. Champerty may be in personal as well as in real actions. *Hawk. P. C. b.* 1, *c.* 84, *s.* 5; and to maintain a defendant may be champerty. *Ibid. s.* 8.

By 31 Eliz. c. 5, the offence of champerty may be laid in any county, at the pleasure of the informer.

Various cases have occurred in modern times, in which the doctrine of champerty has come in question. Where a bill was filed to set aside an agreement made by a seaman, for the sale of his chance of prize-money, Sir William Grant, M. R., expressed an opinion that the agreement was void from the beginning, as amounting to champerty, viz., the unlawful maintenance of a suit, in consideration of a bargain for a part of the thing, or some profit out of it. *Stevens* v.

Bagwell, 15 *Ves*. 139. So in a late case it was held, that an agreement to communicate such information as should enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. *Stanley* v. *Jones*, 7 *Bingh*. 369; 5 *Moore & P*. 193; see *Potts* v. *Sparrow*, 6 *C. & P*. 749.

Embracery.] Embracery, likewise, is another species of maintenance. Any attempt to corrupt, or influence, or instruct a jury, or to incline them to be more favourable to one side than the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of the counsel in open court at the trial of the cause, is an act of embracery; whether the jurors gave any verdict or not, and whether the verdict given be true or false. *Hawk. P. C. b*. 1, *c*. 85, *s*. 1. The giving of money to a juror after the verdict, without any preceding contract, is an offence savouring of embracery; but it is otherwise of the payment of a juror's travelling expenses. *Id. s*. 3. Embracery is punishable by fine and imprisonment. *Ibid. s*. 7.

Analogous to the offence of embracery is that of persuading, or endeavouring to persuade, a witness from attending to give evidence, an offence punishable with fine and imprisonment. It is not material that the attempt has been unsuccessful. *Hawk. P. C. b*. 1, *c*. 21, *s*. 15; *Lawley's case*, 2 *Str*. 904; 1 *Russ. by Grea*. 182.

MALICIOUS INJURIES.

THE law relating to malicious injuries to property was formerly comprised in a great variety of statutes, which are now repealed by the 7 & 8 Geo. 4, c. 27, and new provisions substituted in their place, by the 7 & 8 Geo. 4, c. 30. In the latter act, certain general clauses are contained, which being applicable to the greater part of the offences after mentioned, may be most conveniently inserted in this place.

GENERAL CLAUSES.

Proof of malice against owner.] By the 7 & 8 Geo. 4, c. 30, s. 25 (the 9 Geo. 4, c. 56, s. 32, I.), it is enacted, "that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property, in respect of which it shall be committed, or otherwise."

Apprehension of offenders.] By the 7 & 8 Geo. 4, c. 30, s. 28, for the more effectual apprehension of all offenders against this act, it is enacted, "that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

Accessaries.] By the 26th section, "in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender." And see now 11 & 12 Vict. c. 46, *ante*, p. 211.

Punishment—hard labour.] By s. 27, "where any person shall be convicted of any indictable offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

But now by the 7 Wm. 4, and 1 Vict. c. 90, s. 5, solitary confinement shall not exceed one month at a time, and not more than three months in any one year.

WITH REGARD TO MINES.

Proof of drowning a mine, or filling up a shaft with intent to destroy the mine.] The 39 & 40 Geo. 3, c. 77, relating to this subject, being repealed, the offence is now provided against by the 7 & 8 Geo. 4, c. 30, the sixth section of which enacts, "that if any person shall unlawfully and maliciously cause any water to be conveyed

into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment: Provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working."

The 9 Geo. 4, c. 56, s. 7 (I.) is word for word the same.

The prosecutor must prove: 1. the act of causing the water to be conveyed into the mine, &c., for which purpose it will probably be necessary to resort to circumstantial evidence; 2. that the act was done unlawfully and maliciously; 3. the intent to destroy or damage the mine, or hinder the working; and 4. that the mine is in the possession of the party named.

Where A. and B. were the owners of adjoining collieries, and A., asserting that a certain airway belonged to him, directed his workmen to stop it up, and they, acting *bonâ fide*, and believing that A. had a right to give such an order, did so; Lord Abinger, C. B., held, they were not guilty of felony under the above section. *James's case*, 8 *C. & P.* 131. But if such workmen knew that the stopping up of the airway was a malicious act of their master, such workmen would be guilty of felony. *Ibid.*

In an indictment under this section the mine may be laid as the property of the person in possession and working it, though only an agent for others. *Jones's case*, 2 *Moo. C. C.* 293.

The setting fire to mines is provided against by the 7 Wm. 4, and 1 Vict. c. 89, s. 9; see *ante*, p. 273.

Engines, &c., used in mines.] By the 7 & 8 Geo. 4, c. 30, s. 7, "if any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals, from any mine, whether such engine, staith, building, erection, bridge, waggon, way or trunk, be completed or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned." (*Section* 6, *supra.*)

The 9 Geo. 4, c. 56, s. 8 (I.), exactly corresponds, except that the words "or any shaft, passage, drain, or level," are introduced before the words "for sinking."

If a steam engine used in working a mine be maliciously set in motion without any machinery attached to it, with intent to damage it or render it useless, the case is within the statute. *R.* v. *Norris*, 9 *C. & P.* 241.

Damaging a drum moved by a steam engine is not damaging the steam engine; but damaging a scaffolding placed across the shaft

of a mine, in order to work a level, is damaging "an erection used in conducting the business of a mine." *R.* v. *Whittingham*, 9 *C. & P.* 234.

WITH REGARD TO BREAKING DOWN, ETC., SEA-BANKS, LOCKS, WORKS ON RIVERS, CANALS, AND FISH-PONDS.

The former statutes relating to these offences were the 6 Geo. 2, c. 37; the 8 Geo. 2, c. 20; the 4 Geo. 4, c. 46; and the 1 Geo. 4, c. 115; but these statutes are now repealed, and their provisions consolidated in the 7 & 8 Geo. 4, c. 30.

Proof of breaking down sea-banks, banks of canals, marshes, &c.] By the 7 & 8 Geo. 4, c. 30, s. 12, "if any person shall unlawfully and maliciously break down or cut down any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment."

With regard to breaking down fish-ponds, &c.] Breaking down the mounds of fish-ponds was formerly punishable by the 5 Eliz. c. 21, and the 9 Geo. 1, c. 22. Those statutes are repealed by the 7 & 8 Geo. 4, c. 30, the 15th section of which statute enacts, "that if any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill-pond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

The above section provides against the defect in the former stat. 9 Geo. 1, c. 22, under which it was held, that if the prisoner broke down the mound of the pond with intent to steal the fish, it was not within the statute. *Ross's case*, *Russ. & Ry.* 10.

WITH REGARD TO TURNPIKE-GATES, TOLL-HOUSES, ETC.

By the 7 & 8 Geo. 4, c. 30, s. 14, "if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing-engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly."

WITH REGARD TO TREES AND VEGETABLE PRODUCTIONS.

Proof of cutting, &c., trees, &c. above the value of 1*l. in parks, &c.*] The provisions on this subject were formerly contained in the statutes 6 Geo. 3. c. 36, and 4 Geo. 4, c. 54: but these were repealed by the 7 & 8 Geo. 4, c. 27, and the following provisions substituted by the 7 & 8 Geo. 4, c. 30.

By the 19th section of that statute, "if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years: and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned."

The prosecutor must prove: 1. that the tree, sapling, &c., in question, was growing in some park, pleasure ground, &c.; 2. that its value exceeded 1*l.*; 3. that it is the property of the prosecutor; 4. that the defendant cut, rooted it up, or otherwise destroyed or damaged the whole or some part of it; 5. that the act of the defendant was wilful and malicious.

When the ground is described as adjoining to a dwelling-house, and it appears that the ground and dwelling-house are separated by a walk, it is a variance. *Hodge's case, Moo. & Malk., N. P. C.* 341.

Upon the statute 9 Geo. 1, c. 22, s. 1, the words of which were, "shall cut down or otherwise destroy," it was held that the cutting down of fruit-trees, though such cutting down did not destroy the trees, was within the act. *Taylor's case, Russ. & Ry.* 373.

The actual injury to the trees themselves must exceed the value of the sum mentioned in this section. When therefore the prisoner was indicted for having done damage to trees in a hedge to an amount exceeding *5l.*, it appeared that the actual injury done to the trees amounted to *1l.* only, but that it would be necessary to stub up the old heap and replace it, the expense of which would be *4l.* 14*s.* more; the conviction was held to be wrong. *Whiteman's case*, 1 *Dear. C. C. R.* 353; *S. C.* 23 *L. J. M. C.* 120.

By the 9 Geo. 4, c. 56, s. 19 (I.), persons damaging trees, saplings, shrubs, or underwood between sunset and sunrise are guilty of felony punishable by transportation for seven years, or imprisonment not exceeding two years; and persons doing the like damage between sunrise and sunset, if such damage exceed *5l.*, are also guilty of felony punishable in the same manner, but if such damage be under *5l.* are punishable summarily by imprisonment not exceeding twelve months.

Proof of destroying or damaging trees, &c., wheresoever growing, of any value above 1*s.*] By the 7 & 8 Geo. 4, c. 30, s. 20, "if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1*s.* at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned."

The prosecutor must prove, 1. the two previous convictions by certified copies; 2. the commission of the third offence, by proving the cutting, &c., of the tree; 3. that it is above the value of 1*s.*; 4. that it is the property of the party mentioned; and 5. that the act was done wilfully and maliciously.

Proof of destroying plants, &c., in a garden.] By the 7 & 8 Geo. 4, c. 30, s. 21 (the 9 Geo. 4, c. 56, s. 21, I.), "if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory,

every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned."

The proofs on a prosecution for this offence will resemble those in the last case.

The words "plant," or "vegetable production," do not apply to young fruit-trees. *Hodge's case, M. & M.* 341, *ante*, p. 664.

Proof of cutting or destroying hopbinds.] By the 7 & 8 Geo. 4, c. 30, s. 18, "if any person shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, every such offender shall be guilty of felony," [and being convicted thereof, was liable to be transported for life, or for not less than seven years, or to be imprisoned for not exceeding four years, &c.]

The 7 Wm. 4 and 1 Vict. c. 90, s. 2, repeals so much of the above section as relates to the punishment of persons convicted of the offences therein specified, and enacts, that "every person convicted after the commencement of this act of any such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

For s. 3 of the above act, see *ante*, p. 358.

The prosecutor must prove the cutting or destroying of the hopbinds, that they were growing on poles in some plantation of hops, the property of the party specified, and that the act was done unlawfully and maliciously.

WITH REGARD TO SHIPS.

Proof of destroying ships with intent, &c.] The offence of destroying ships with intent to defraud underwriters, &c., was provided against by the 43 Geo. 3, c. 113, and 33 Geo. 3, c. 67, which were repealed by the 7 & 8 Geo. 4, c. 27, and a new enactment substituted by the 7 & 8 Geo. 4, c. 30, s. 9, but which section has also been repealed and re-enacted, with some verbal alterations, by the 7 Wm. 4 and 1 Vict. c. 89, s. 6 (E. & I.).

The prosecutor must prove, 1. that the matter set fire to was a ship or vessel; 2. the act of setting fire to or destroying; 3. the intent within the words of the statute; and 4. the malice.

Patteson, J., inclined to think that a pleasure-boat, eighteen feet long, was a ship or vessel within the meaning of the act. *Bowyer's case*, 4 *C. & P.* 559; see also *Smith's case*, *ante*, p. 276.

In construing the repealed acts of the 4 & 10 Geo. 1, it was ruled that if a ship was only run aground or stranded upon a rock, and was afterwards got off in a condition capable of being easily refitted, she

could not be said to be either cast away or destroyed. *De Londo's case*, 2 *East*, *P. C.* 1098.

Where the intent is laid to be to defraud the underwriters, see as to the proof of the policy, *ante*, p. 273.

Proof of maliciously damaging ships, otherwise than by fire, with intent to destroy the same, &c.] By the 7 & 8 Geo. 4, c. 30, s. 10, (the 9 Geo. 4, c. 56, s. 10, I.), "if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

The proofs, upon a prosecution for this offence, will resemble those in the case last mentioned, except that it will be sufficient to prove an intent to destroy the ship, without showing any intent to prejudice any person thereby.

In an indictment under this clause, it does not appear to be necessary to aver that the damage was done "otherwise than by fire," if the mode in which it was done be stated, as by boring a hole in the bottom of the vessel. *R.* v. *Bowyer*, 4 *C.* & *P.* 559. See *ante*, *Arson*.

Proof of exhibiting false lights, &c., with intent to bring ships into danger.] By the 7 Wm. 4 and 1 Vict. c. 89, s. 5 (E. & I.), (re-enacting part of the 11th section of the 7 & 8 Geo. 4, c. 30, and the 9 Geo. 4, c. 56 (I.), with some verbal alterations,) "whosoever shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully or maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and, being convicted thereof, shall suffer death."

This sentence may be recorded.

Proof of destroying wrecks, or any articles belonging thereto.] By the 7 Wm. 4 and 1 Vict. c. 89, s. 8 (E. & I.), (re-enacting the other part of the 11th section of the 7 & 8 Geo. 4, c. 30, and the 9 Geo. 4, c. 56 (I.), with some verbal alterations,) "whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or be stranded or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

For s. 4 of the above act, providing against the setting fire to or destroying ships with intent to murder, &c., see *ante*, p. 275.

Proof of cutting away buoys, &c.] Another offence, connected with that of malicious injury to ships, is the wilful destruction of buoys; with regard to which it is enacted, by the 1 & 2 Geo. 4, c. 75, s. 1, "that if any person or persons shall wilfully cut away, cast adrift,

remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark, belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made."

Proof of receiving anchors, &c., weighed up.] By the 1 & 2 Geo. 4, c. 75, s. 12, "if any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandize, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions thereinbefore contained, with regard to such articles, shall not have been previously complied with, such person or persons shall on conviction thereof be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court, before which, he, she, or they shall be tried."

And by sect. 15, persons carrying anchors and cables abroad may be transported for any term not exceeding seven years.

By 1 and 2 Geo. 4, c. 76, similar provisions are made for the Cinque Ports.

See also the 2 Geo. 2, c. 28, s. 13, and the 2 and 3 Vict. c. 47, ss. 27, 28, as to cutting and destroying, &c., cordage, &c., on the Thames.

WITH REGARD TO MACHINERY AND GOODS IN COURSE OF MANUFACTURE.

The law relating to the destruction of machinery was contained in a variety of statutes which were repealed by the 4 Geo. 4, c. 46; and the latter statute, so far as it relates to the same subject, was also repealed by the 7 & 8 Geo. 4, c. 27, and the following provisions substituted by the 7 & 8 Geo. 4, c. 30; the third section of which enacts, "that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any goods or article of silk, woollen, linen or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise

manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit), in addition to such imprisonment."

The 9 Geo. 4, c. 56, s. 3 (I.), exactly corresponds with the above clause, except that the word "linen" appears to be omitted, through mistake, and the word "mohair," which is not in the English statute, is introduced.

These clauses enumerate a variety of separate offences. The proofs in general will be: 1. proof of the unlawful and malicious act; 2. the nature of the property upon which that act was done, which must appear to be within the description of the statute; 3. the property of the prosecutor; 4. the intent with which the act was done, according to the statute; and 5. the malice.

Where the prisoner was indicted, under the 28 Geo. 3, c. 55, s. 4, for entering a shop, and maliciously *damaging* a certain frame used for the making of stockings, and it appeared that he had unscrewed and carried away a part of the frame, called the *half-jack*, an essential part of the frame, without which it is useless, this was held a *damaging* of the frame within the statute. *Tacey's case, Russ. & Ry.* 452.

Where the prisoners were charged, under the 22 Geo. 3, c. 40, s. 1, with breaking into a house, with intent to cut and destroy certain tools employed in making woollen goods, and it appeared that the article destroyed was part of the loom itself, they were held to be rightly acquitted. *Hell's case, Russ. & Ry.* 483.

Proof of destroying threshing-machines, and certain machines used in manufactures.] By the 7 & 8 Geo. 4, c. 30, s. 4, "if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing-machine or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials, mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace); every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

The 9 Geo. 4, c. 56, s. 4 (I.), is exactly the same, except that the words "or any tool or implement" are introduced after the word "moveable."

It has been held in several cases, that it is an offence within the statute, though the machine at the time when it is broken, has been taken to pieces, and is in different places, only requiring the carpenter to put those pieces together again. *R.* v. *Mackerell*, 4 *C. & P.* 448. So where the machine was worked by water, and the prosecutor expecting a riot, took it to pieces, and removed the pieces to the

distance of a quarter of a mile, leaving only the water-wheel and its axis standing, and the wheel was destroyed by the prisoners; this was held to be an offence within the statute. *Fidler's case*, 4 *C. & P.* 449. Where certain sideboards were wanting to a machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually, it was still held to be a threshing-machine within the statute. *Bartlett's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 1517. So also where the owner removed a wooden stage, belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared that, though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held to be within the statute. *Chubb's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 151. But where the owner had not only taken the machine to pieces, but broken the wheel, from fear of its being set on fire: and it appeared that, without the wheel, the engine could not be worked; this was held to take the case out of the statute. *West's case, Salisb. Sp. Com.* 2 *Deac. Dig. C. L.* 1518. See also *Crutchley's case, ante*, p. 24.

WITH REGARD TO WORKS OF ART.

By the 8 & 9 Vict. c. 44 (E. & I.), s. 1, "every person who shall unlawfully and maliciously destroy or damage anything kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, or library, or other repository is either at all times, or from time to time, open for the admission of the public, or of any considerable number of persons to view the same, either by permission of the proprietor thereof, or by payment of money before entering the same, or any picture, statue, monument, or painted glass in any church, chapel, or other place of religious worship, or any statue or monument exposed to public view, shall be guilty of a misdemeanor, and, being duly convicted thereof, shall be liable to be imprisoned for any period not exceeding six months, and, if a male, may, during the period of such imprisonment, be put to hard labour, or be once, twice, or thrice privately whipped, in such manner as the court before which such person shall be tried, shall direct."

By s. 2, "every punishment imposed on any person for an offence against this act shall apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the thing damaged or destroyed, or not."

By s. 3, "any person found committing any offence against this act may be immediately apprehended, without a warrant, by any other person, and forthwith taken before some neighbouring justice of the peace, and be dealt with according to law."

By s. 4, "nothing herein contained shall be deemed to affect the right of any person to recover by action at law damages for the injury so committed."

By s. 5, "every person who shall abet, counsel, or procure the commission of any offence against this act, shall be punished as a principal offender."

Blowing up dwelling-houses—some person being therein, &c.] By the 9 & 10 Vict. c. 25, s. 1, it is enacted that "whoever shall unlawfully and maliciously by the explosion of gunpowder or other explosive substance destroy, throw down, or damage the whole or any part of any dwelling-house, *any person being therein*, shall be guilty of felony."

By sect. 2, "that whoever shall unlawfully and maliciously by the explosion of gunpowder or other explosive substance destroy or damage any building with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony."

By sect. 5, "that whoever shall be convicted of any felony herein-before mentioned, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Attempting to blow up buildings.] Sect. 6 of the 9 & 10 Vict. c. 25, enacts that "whoever shall unlawfully and maliciously place, or throw in, into, upon, against, or near any building or vessel, any gunpowder or other explosive substance, with intent to do any bodily damage to any person, or to destroy or damage any building or vessel, or any machinery, working-tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury is effected to any person, or any damage to any building, vessel, machinery, working-tools, fixtures, goods, or chattels, be guilty of felony; and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding two years."

Manufacturing explosive substances for purpose of committing above offences.] Sect. 8 enacts, that "whoever shall knowingly have in his possession, or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any offence against this act, shall be guilty of a misdemeanor; and on conviction thereof, shall be liable to be imprisoned for any term not exceeding two years."

Punishment, &c. under act.] Sect. 9 enacts, that "every male person under the age of eighteen years, who shall be convicted of any offence under this act, or who shall be convicted of feloniously setting fire to any building, vessel, or mine, or to any stack or steer, shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped in such manner and as often, not exceeding thrice, as the court shall direct."

Sect. 10 enacts, that "in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

Sect. 11 enacts, that "where any person shall be convicted of any

offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one calender month at any one time, and not exceeding three calendar months in any one year, as to the court in its discretion shall seem meet."

For malicious injuries to railways, see *post, title Railways.*

MANSLAUGHTER.

Distinction between manslaughter and murder.] Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature. 1 *East, P. C.* 218; *Foster*, 290. It also differs from murder in this respect, that there cannot be any accessaries before the fact to manslaughter, since the act is presumed to be altogether sudden and without premeditation. 1 *Hale, P. C.* 437. Thus if there be an indictment charging A. with murder, and B. and C. with counselling and abetting, as accessaries before the fact only, (and not as *present*, aiding and abetting, for such are principals,) and A. is acquitted of murder, but found guilty of manslaughter, B. and C. must be altogether acquitted. 1 *Hale, P. C.* 437, 450; 1 *Russ. by Grea.* 579.

Where A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the felony and murder aforesaid; Tindal, C. J., held, that if the offence of A. was reduced to manslaughter, C. might, notwithstanding, be found guilty as an accessary after the fact. *Greenacre's case*, 8 *C. & P.* 35.

In considering the evidence in cases of manslaughter, it will merely be necessary to state the points shortly, and to refer generally to the cases, all of which will be found set forth at length under the title *Murder*.

The subject of manslaughter will be treated under the following heads: 1, cases of provocation; 2, cases of mutual combat; 3, cases of resistance to officers of justice, &c.; 4, cases of killing in the prosecution of an unlawful or wanton act; 5, cases of killing in the execution of a lawful act, improperly performed, or performed without lawful authority. See 1 *Russ. by Grea.* 597.

Proof in cases of provocation.] Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation, and without malice, or upon sudden combat, it will be manslaughter;

if without such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder. 1 *East, P. C.* 232; *Foster*, 313. But where the provocation is sought by the prisoner, it will not furnish any defence against the charge of murder. 1 *East, P. C.* 239; 1 *Hale, P. C.* 457.

Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the charge of murder, neither are indecent or provoking actions or gestures, without an assault. *Foster*, 290, 291; *Brain's case*, 1 *Hale, P. C.* 455; 1 *Russ. by Grea.* 514; *Morley's case*, 1 *Hale, P. C.* 456; *Kel.* 55; 1 *East, P. C.* 233.

Although an assault is in general such a provocation as that, if the party struck strikes again, and death ensues, it is only manslaughter; yet it is not every trivial assault which will furnish such a justification. 1 *East. P. C.* 236; 1 *Russ. by Grea.* 515; *Stedman's case, Foster*, 292; *Reason's case, Foster*, 293; 2 *Str.* 499; 1 *East, P. C.* 320. On the subject of blows accompanied by words, Pollock, C. B., has expressed himself as follows, "If there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation, by means of words and gestures, as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only." *Sherwood's case*, 1 *C. & K.* 556.

In cases depending upon provocation, it is always material to consider the nature of the weapon used, by the prisoner, as tending to show the existence of malice. If a deadly weapon be used, the presumption is, that it was intended to produce death, which will be evidence of malice; but if the weapon was not likely to produce death, that presumption will be wanting. 2 *Lord Raym.* 1498; *Rowley's case*, 12 *Rep.* 87; 1 *Hale, P. C.* 453; *Foster*, 294; 1 *East, P. C.* 236; 1 *Leach*, 368; *Wigg's case*, 1 *Leach*, 378 (*n*). In order that the provocation may have the effect of reducing the offence to manslaughter, it must appear to have been recent; for if there has been time for passion to subside, and for reason to interpose, the homicide will be murder. *Foster*, 296; 1 *East, P. C.* 252; 2 *Lord Raym.* 1496; *Oneby's case*, 2 *Str.* 766; 2 *Lord Raym.* 1485; *Hayward's case*, 6 *C. & P.* 157. As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of express malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 *Russ. by Grea.* 585; *Mason's case, Foster*, 132; 1 *East, P. C.* 239. There is one peculiar case of provocation which the law recognises as sufficient to reduce the act of killing to manslaughter; where a man finds another in the act of adultery with his wife, and kills him in the first transport of his passion. *Manning's case, Sir T. Raym.* 212; 1 *Russ. by Grea.* 581. But if the husband kill the adulterer deliberately, and upon revenge, after the fact and sufficient cooling time, the provocation will not avail in alleviation of the guilt. 1 *East, P. C.* 251. *Kelley's case*, 2 *C. & K.* 814, *per Rolfe, B.*

So if a father see a person in the act of committing an unnatural offence with his son, and instantly kill him, it seems that it will be only manslaughter, and that of the lowest degree; but, if he only hear of it, and go in search of the person, and meeting him, strike

him with a stick, and afterwards stab him with a knife, and kill him, in point of law it will be murder. *Fisher's case*, 8 *C. & P.* 182.

In the above case, Park, J., said, that whether the blood has had time to cool or not, is a question for the court, and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received and the act done.

It has been held by Rolfe, B., that a blow given to the prisoner's wife would afford the same justification as a blow given to the prisoner himself, so as to reduce the killing to manslaughter. *R.* v. *Henry Rodgers, MS. York Spr. Ass.* 1842.

It has been held by Park and Littledale, JJ., that *Grindley's case*, 1 *Russ. by Grea.* 8, in which Holroyd, J., ruled, that though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the question is, whether an act is premeditated or not, or done only from sudden heat or impulse, the fact of the party being intoxicated was a circumstance proper to be taken into consideration, is not law. *Carroll's case*, 7 *C. & P.* 145. Where the prisoner was indicted for stabbing with a fork with intent to murder, and it appeared that he was in liquor, Alderson, B., said, "If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." *Meakin's case*, 7 *C. & P.* 297. In *Thomas's case*, *Id.* 817, which was also an indictment for maliciously stabbing, Parke, B., told the jury, that "drunkenness may be taken into consideration in cases where, what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse."

Proof in cases of mutual combat.] Death in the course of a mutual combat, though in some cases it amounts to murder, is generally found to constitute manslaughter only, there being most frequently an absence of that malice requisite to a conviction for murder, and a sufficient degree of provocation to show such absence.

The degree of provocation is not altogether of the same nature in these cases as in those mentioned under the last head, for where, upon words of reproach, or indeed upon any other sudden provocation, the parties come to blows, and a combat ensues, in which no undue advantage is taken on either side, and one of the parties is killed, it is manslaughter only. 1 *East, P. C.* 241; 1 *Hale, P. C.* 456; *Foster*, 295. But if one of the parties provide himself with a deadly weapon beforehand, which he uses in the course of the combat, and kills his adversary, this will be murder, though it would be only manslaughter if, in the heat of the combat, he snatched up the weapon, or had it in his hand at the commencement of the combat, but without an intention of using it. *Anderson's case*, 1 *Russ. by Grea.* 531;

Kessal's case, 1 *C. & P.* 437; *Snow's case*, 1 *East, P. C.* 244-5; and see *Murphy's case, post, p.* 702.

Not only may death, in the course of a mutual combat, be heightened to murder by the use of deadly weapons, but by the manner of fighting, as in "an up and down fight." *Thorpe's case*, 1 *Lewin, C. C.* 171. To reduce the homicide to manslaughter in these cases, it must appear that no undue advantage was sought or gained on either side. *Foster*, 295; 1 *East, P. C.* 242; *Whitely's case*, 1 *Lewin, C. C.* 173. The lapse of time between the origin and the quarrel is also to be greatly considered, as it may tend to prove malice. *Lynch's case*, 3 *C. & P.* 324. But it is not in every case where there has been an old grudge that malice will be presumed. *Hawk. P. C. b.* 1, *c.* 31, *s.* 30; 1 *Hale, P. C.* 452.

If two parties go out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow. *R.* v. *Lewis*, 1 *C. & K.* 419. All struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *R.* v. *Canniff*, 9 *C. & P.* 539.

The case of deliberate duelling is an exception to the general rule, that death ensuing in the course of a mutual combat is manslaughter only. *Foster*, 297. The authorities upon this subject will be found under the head *Murder*.

Proof in cases of resistance to officers of justice, &c.] The cases of homicide which arise in the instances of officers of justice, or others having authority to arrest, where resistance is made to them in the execution of their duty, include every species of homicide. If the officer is killed in the lawful execution of his duty, by the party resisting him, it is *murder*. If he be killed when acting under a void or illegal authority, or out of his jurisdiction, it is manslaughter, or excusable homicide, according to the circumstances of the case. If the party about to be arrested resist, and be killed, or attempt to make his escape, and the officer cannot take him without killing him, it will be manslaughter, or excusable or justifiable homicide, according to circumstances. These distinctions will be noticed, and the different authorities and cases collected under the head *Murder*; and it will only therefore be necessary to refer under the present head to the cases relating to manslaughter. In what instances peace officers are authorised to arrest individuals, and where they have power to do so without warrant, and in what cases the process under which they act is regular or irregular, and what is the consequence of such irregularity, will be fully stated in a subsequent part of this work. *Vide post, title Murder.*

In order to render it murder, in a person who kills an officer attempting to arrest him, it must appear that he had notice of the character in which the officer acted; for if he had not, the offence will amount to manslaughter only. *Foster*, 310. The mode in which a constable is bound to notify his authority will be stated hereafter, *post, title Murder.*

Where a peace officer, who attempts to arrest another without having sufficient authority, is resisted, and in the course of that resistance is killed, the offence only amounts to manslaughter; as where he attempts to arrest on an insufficient charge of felony. *Curvan's case*, 1 *Moo. C. C.* 132, *post*; *Thomson's case*, *id.* 80. So if a peace officer attempts to execute process out of his own jurisdiction, and is killed under the like circumstances. 1 *Hale, P. C.* 458; 1 *East, P. C.* 314;

Mead's case, 2 *Stark. N. P. C.* 205, *post.* So where a peace officer unlawfully attempts to break open the outer door or window of a house, (and as to his authority herein, see *post, title Murder*,) and he is resisted, and killed in the course of that resistance, it is manslaughter. 1 *Hale, P. C.* 458.

With regard to the cases of peace officers killing others in the supposed execution of their duty, it is to be observed that where they act without proper authority, and the party refuses to submit, and death ensues, it will be murder or manslaughter, according to the circumstances of the case. 1 *Hale, P. C.* 481; *Foster*, 271. So where an officer uses a greater degree of violence than is necessary to overcome the resistance of the party, and death ensues, it will be manslaughter in the officer. 1 *East, P. C.* 297. So where an officer kills a party attempting to make an escape, when arrested on a charge of misdemeanor. *Forster's case*, 1 *Lewin, C. C.* 187, *post, title Murder.*

A special constable, duly appointed under the 1 & 2 Wm. 4, c. 41, remains a constable until his services are either determined or suspended under sec. 9. Upon an indictment for the murder of J. Nutt, it appeared that Nutt was appointed, on the 9th of February, 1832, by two justices, in writing, and under their hands, "to act as a special constable for the parish of St. George, until he received notice that his service is suspended or determined." Nutt was killed in conveying a prisoner to the station house, on the 16th of August, 1840. It was objected that Nutt did not continue a special constable till that time; but it was held that the appointment was indefinite in point of time, and remained valid and in force till either suspended or determined under sec. 9; and as Nutt's appointment was not shown to have determined, he continued to be a special constable under the act on the 16th of August, 1840, and had then, under sec. 8, all the ordinary powers of a common constable. *Per Coleridge, J., Porter's case,* 9 *C. & P.* 778.

With regard to private persons attempting to make an arrest, the rule is the same as in the case of peace officers. Where a private person is justified in making an arrest, (as to which see the cases stated under the head *Murder*,) and he is resisted and is killed, it will be murder. But if a private person, without lawful authority, attempt to arrest, and be killed by the party whom he attempts to arrest, it will only be manslaughter in the latter. *Vide* the cases cited *post, title Murder.*

Proof in cases of killing in the performance of an unlawful or wanton act.] If in doing an unlawful act death ensue, in consequence of the negligence of the party, but without any intent to do bodily harm, it is manslaughter. *Foster*, 261. It is not necessary, in order to render the homicide manslaughter, that the act in the performance of which death is caused, should be a felony, or even a misdemeanor; it is enough if it be an act contrary to law.

Thus if a person in sport throw stones down a coal-pit, whereby a man is killed, this is manslaughter, though the party was only a trespasser. *Fenton's case*, 1 *Lewin, C. C.* 179. So where a lad, as a frolic, without any intention to do any harm to any one, took the trapstick out of the front part of a cart, in consequence of which it was upset, and the carman, who was in it putting in a sack of potatoes, was pitched backward on the stones and killed; Gurney, B., and Williams, J., held that the lad was guilty of manslaughter. *Sullivan's case*, 7 *C. & P.* 641. So if an improper quantity of spirituous liquors be given to a child,

heedlessly, and for brutal sport, and death ensues, it will be manslaughter. *Martin's case*, 3 *C. & P.* 211. The prisoners were indicted for murder. The deceased, being in liquor, had gone at night into a glass-house and laid himself down upon a chest. While there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly, the consequence of which was, that the straw ignited, and he was burnt to death. There was no evidence of express malice on the part of the prisoners. Patteson, J., told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter. The prisoners were convicted of the latter offence. *Errington's case*, 2 *Lew. C. C.* 217. Where a mother, being angry with one of her children, took up a small piece of iron, used as a poker, and on his running to the door of the room which was open, threw it after him, and hit another child, who happened to be entering the room at the moment, in consequence of which the latter died; Park, J., held this to be manslaughter, although it appeared that the mother had no intention of hitting her child with whom she was angry, but only intended to frighten him. The learned judge said, "if a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck and died, it would have been manslaughter, and so it is under the present circumstances." *Conner's case*, 7 *C. & P.* 438. The prisoner was indicted for manslaughter. The deceased had entered the prisoner's house in his absence, and on his return was desired to withdraw, but refused to go. Upon this, words arose, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused an injury which produced his death. Alderson, B., said, "a kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter." *Wild's case*, 2 *Lew. C. C.* 214. A man was in possession, under the sheriff. One of the prisoners, of whose goods he was in possession, assisted by the other prisoner, plied the man with liquor, themselves drinking freely also. When he was very drunk, they put him into a cabriolet, and caused him to be driven about the streets; about two hours after he had been put in the cabriolet he was found dead. Lord Denman, C. J., told the jury, that if the prisoners, when the deceased was drunk, drove him about in the cabriolet, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Packard's case*, *Carr. & M.* 246.

Another large class of cases of manslaughter consists of those in which death takes place in the course of prize-fights. 1 *East, P. C.* 270; *Murphy's case*, 6 *C. & P.* 103; *Hargrave's case*, 5 *C. & P.* 170.

Proof in cases of killing in the performance of a lawful act.] Death ensuing in the performance of a lawful act may amount to manslaughter, by the negligence of the party performing the act; as in the instance of workmen throwing down stones from the top of a house, where they were working, where there is a small probability of persons passing by. 1 *East, P. C.* 262; *Foster*, 262.

The most common cases of this class are those where the death has

been occasioned by negligent driving. 1 *East, P. C.* 263; *Walker's case*, 1 *C. & P.* 320; *Knight's case*, 1 *Lewin, C. C.* 168; *Grout's case*, 6 *C. & P.* 629. And it is no ground of defence that the death was partly caused by the negligence of the deceased himself. *Per Pollock, C. B.*, in *Swindall's case*, 2 *C. & K.* 230.

Where a person, practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter. 1 *Hale, P. C.* 429; 4 *Bl. Com. c.* 14; *Van Butchell's case*, 3 *C. & P.* 632; *Williamson's case*, 3 *C. & P.* 635; *Long's case*, 4 *C. & P.* 398 (*2nd case*); *Senior's case*, 1 *Moo. C. C.* 346; *Simpson's case*, 4 *C. & P.* 407 (*n.*), 1 *Lewin, C. C.* 172; *Spiller's case*, 5 *C. & P.* 333; *Ferguson's case*, 1 *Lewin, C. C.* 181; *Spilling's case*, 2 *Moo. & R.* 107; *Ellis's case*, 2 *C. & K.* 470; *Whitehead's case*, 2 *C. & K.* 368; all stated *post, title Murder.*

So a person may, by a neglect of duty, render himself liable to be convicted of manslaughter; as where an engineer, employed to manage a steam engine, used to draw up miners from a coal-pit, left the engine in charge of a boy whom he knew was incapable of managing it, and death ensued in consequence to one of the miners, the engineer was held by Campbell, C. J., to be guilty of manslaughter. *Lowe's case*, 3 *C. & K.* 123. See also *Haines's case*, 2 *C. & K* 368; and *Barrett's case*, 2 *C. & K.* 343.

Trustees, appointed under a local act for the purpose of repairing roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter if a person, using one of such roads, is accidentally killed in consequence of the road's being out of repair through neglect of the trustees to contract for repairing it. *Reg.* v. *Pollock*, 17 *Q. B.* 34.

In *Sarah Waters's case*, 1 *Den. C. C. R.* 356; *S. C.* 18 *L. J. M. C.* 53, the prisoner was convicted of the manslaughter of her infant female child, being of such tender age and feebleness as to be incompetent to take charge of herself, upon an indictment, which stated the death to have been caused by exposure, whereby the child became mortally chilled, frozen, and benumbed. And see *ante, title Illtreating Apprentices, &c.* p. 564; and *post, title Murder*, p. 707.

Punishment of manslaughter.] By the 9 Geo. 4, c. 31, s. 9, (the 10 Geo. 4, c. 34, s. 12, I.) "every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction for any term not exceeding four years, or to pay such fine as the court shall award."

MURDER.

Murder is the voluntarily killing of any person under the king's peace of malice prepense or aforethought, either express or implied by law. 1 *East, P. C.* 214; 3 *Inst.* 47; 1 *Hale, P. C.* 425.

Statutory provisions—punishment.] By the 9 Geo. 4, c. 31, s. 3, (the 10 Geo. 4, c. 34, s. 4, I.) "every person convicted of murder, or of being accessary before the fact to murder, shall suffer death as a

felon. And every accessary after the fact to murder, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour in the common gaol, or house of correction, for any time not exceeding four years."

By s. 2, "every offence which before the commencement of the act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence, and all persons guilty thereof, whether as principals or accessaries, shall be dealt with, indicted, tried, and punished, as principals and accessaries in murder."

By s. 4, provision was made for the execution of murderers, on the day next but one after the passing of the sentence, unless the same was a Sunday, and by s. 5, for the dissection of their bodies, and by s. 6, for their food and treatment while under sentence.

By the 2 & 3 Wm. 4, c. 75, s. 16, the 9 Geo. 4, respecting the dissecting of the bodies of murderers, was repealed, and they were directed to be hung in chains, or buried within the precincts of the prison, as the court should direct.

By the 4 & 5 Wm. 4, c. 26 (E. & I.) reciting the 9 Geo. 4, c. 31 (E.) and the 10 Geo. 4, c. 34 (I.) and 2 & 3 Wm. 4, c. 75, it is enacted, "that so much of the said recited act, made and passed in the ninth year of the reign of his Majesty King George 4, as authorises the court to direct that the body of a person convicted of murder, should, after execution, be hung in chains, and also so much of the said recited act made and passed in the tenth year of the same reign, as authorises the court to direct that the body of a person convicted of murder, should, after execution, be dissected or hung in chains, and also so much of the said recited act, made and passed in the second and third years of the reign of his present Majesty, as provides that in every case of conviction of any prisoner for murder, the court shall direct such prisoner to be hung in chains, shall be, and the same is hereby repealed."

Now by the 7 Wm. 4 & 1 Vict. c. 30, s. 1 (E. & I.) after reciting the fourth and sixth sections of the 9 Geo. 4, c. 31, and further reciting, that "for the ends of justice, and especially more effectually to preserve from an irrevocable punishment, any persons who may hereafter be convicted upon erroneous or perjured evidence," it is expedient to alter the said acts in these respects, the above sections are repealed, and it is enacted (s. 2) that from and after the passing of this act sentence of death may be pronounced, after conviction, for murder in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences."

Under this statute, the court has now, in cases of murder as well as of other felonies, the power of recording sentence of death, instead of passing it. *Per Lord Denman, C. J., Mary & Jane Hogg's case,* 2 *Moo. & R.* 380.

Under the old law, where the judge, having mistaken the time of execution, called the prisoner again to the bar and rectified it, a majority of the judges held that the statute was in this respect merely directory, and that the judge might order the prisoner to be executed at any time within forty-eight hours, but all the judges were of opinion that a mistake in this respect might be rectified at any time during the assizes. *Wyatt's case, R. & R.* 230. But where the judge omitted that part of the sentence which formerly related to dissection, it was doubted whether it was not an essential part of the sentence, and the prisoner was pardoned on condition of transportation. *Fletcher's case, R. & R.* 58.

Where the sheriff of the city of Chester refused to execute the prisoners, they were removed by habeas corpus into the court of King's Bench, and executed by the marshal of the marshalsea, assisted by the sheriff of Surrey. *Garside's case*, 2 *A. & E.* 266. Now by the 5 & 6 Wm. 4, c. 1, the sheriff of the city of Chester may be ordered to execute criminals in the county of Chester, or they may be ordered to be executed by the sheriff of the county.

Venue in cases of murder, &c., committed abroad and upon the seas.] With regard to murders committed abroad, it is enacted by the 9 Geo. 4, c. 31, s. 7, "that if any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessary before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the lord chancellor, or lord keeper, or lords commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to inquire of, hear, and determine all such offences, within the county or place limited in their commission, by such good and lawful men of the said county or place as shall be returned before them for that purpose, in the same manner as if the offence had been actually committed in the said county or place: provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences, by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: provided also, that nothing therein contained shall prevent any person from being tried in any place out of this kingdom, for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act."

A Spaniard, being in England, signed articles to serve in a ship "bound on a voyage to the Indian Seas and elsewhere, on a seeking and trading voyage (not exceeding three years' duration) and back to the United Kingdom." "On the ship's arrival at Zanzibar, an island in the Indian Seas which was under the dominion of an Arab king, the captain left the vessel, in pursuance of an understanding in England, and set up in trade; and without the consent of the rest of the crew, engaged the Spaniard as an interpreter, the new captain of the ship not requiring him to serve on board. The ship went two or three short voyages without him, and returned to anchor a few hundred yards from the shore, in a roadstead of seven fathoms water between Zanzibar and several other islands. The crew being on shore a quarrel arose between the Spaniard and one of them, which led to blows by the Spaniard which killed the other. The death took place on board the ship. The Spaniard was brought to England, and indicted and tried in London under a special commission issued in pursuance of the above section. It was held by Vaughan and Bosanquet, JJ., that under the circumstances the prisoner could not be convicted,

first, as he was not a subject of his Majesty within the meaning of that section, and secondly, that, as the death was on ship-board, though the blows were given on shore, the offence could not be said to have been committed according to the words of the statute on land out of the United Kingdom. *De Mattos's case*, 7 *C. & P.* 458. *Quære*, whether, if the Spaniard had continued on board the ship, and had been at the time serving under the articles, he could have been tried as a British subject. *Semble*, that he could not. *Ibid.* And see *R.* v. *Serva and others*, 1 *Den. C. C. R.* 104.

In *Helsham's case*, 4 *C. & P.* 394, where the prisoner was tried under the above section for murder committed in a duel at Boulogne; Bayley, J., seems to have told the jury that they must be satisfied that the prisoner was a British born subject. See also *Depardo's case*, 1 *Taunt.* 26.

A British subject, who commits a murder in a foreign country upon a person not a British subject, is triable in England under the foregoing section. *R.* v. *Azzopardi*, 1 *C. & K.* 203; 2 *Moo. C. C.* 288. And see *Sawyer's case*, 2 *C. & K.* 101.

And by s. 8, of the 9 Geo. 4, c. 31, "where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning or hurt, upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessary before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects, as if such offence had been actually committed in such county or place." The 10 Geo. 4, c. 34, s. 11 (I.) contains a similar provision. See further, *title Venue.*

Proof of a murder having been committed.] The *corpus delicti*, that a murder had been committed by some one, is essentially necessary to be proved; and Lord Hale advises that in no case should a prisoner be convicted, where the dead body has not been found—where the fact of murder depends upon the fact of disappearance, *ante*, p. 18.

A girl was indicted for the murder of her child aged sixteen days. She was proceeding from Bristol to Llandogo, and she was seen near Tintern with a child in her arms, at six o'clock in the evening; she arrived at Llandogo between eight and nine without the child. The body of a child was afterwards found in the Wye, near Tintern, which appeared not to be the child of the prisoner. Lord Abinger, C. B., held that the prisoner must be acquitted, and that she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead. *Hopkins's case*, 8 *C. & P.* 591.

Where the death has been occasioned in secrecy, says Mr. Starkie, a very important preliminary question arises whether it has not resulted from accident, or from the act of the party himself. It sometimes happens that a person, determined on self-destruction, resorts to expedients to conceal his guilt, in order to save his memory from dishonour, and his property from forfeiture. Instances also have occurred where, in doubtful cases, the surviving relations have used

great exertions to rescue the character of the deceased from ignominy by substantiating a charge of murder. (*Cowper's case, 5 St. Tr.*) On the other hand, in frequent instances attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se.* Where the circumstances are natural and real, and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance, which is essential to the case, attempted to be established, be wholly inconsistent and irreconcileable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. 2 *Stark. Ev.* 521, *2nd ed.*

The question, observes Mr. Starkie, whether a person has died a natural death, as from apoplexy, or a violent one, as from strangulation, whether the death of a person found immersed in water, has been occasioned by drowning, or by force and violence previous to the immersion (see *Cowper's case, 5 St. Tr.*) whether the drowning was voluntary, or the result of force, whether the wounds inflicted on the body were inflicted before or after death, are questions to be decided by medical skill. It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted, on the one hand, from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict him notwithstanding strong, but merely circumstantial, evidence against him. Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is, therefore, in all cases expedient that all the accompanying facts should be observed and noted with the greatest accuracy; such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned. 2 *Stark. Ev.* 521, *2nd ed.*

Proof of the murder—as to the party killed.] A child in the womb is considered *pars viscerum matris*, and not possessing an individual existence, and cannot therefore be the subject of murder. Thus, if a woman, quick or great with child, take a potion to procure abortion, or if another give her such potion, or strike her, whereby the child within her is killed, it is neither murder nor manslaughter, 1 *Hale P. C.* 433. Whether or not a child was born alive is a proper question for the opinion of medical men. Where a woman was indicted for the wilful murder of her child, and the opinion of the medical men was that it had breathed, but they could not take upon themselves to say whether it was wholly born alive, as breathing may take place before the whole delivery is completed, Littledale, J., said that with respect to the birth, the being born must mean that the whole body is brought into the world, and that it is not sufficient that the child respire in the progress of its birth. *Poulton's case,* 5 *C. & P.* 329. The authority of this decision was recognised by Park, J., in *Brain's case*, where he

said, "a child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after their birth. But the jury must be satisfied that the child was wholly born into the world before it was killed, or they cannot find the prisoner guilty of murder:" and he cited *Poulton's case*, (*supra*,) *Brain's case*, 6 *C. & P.* 349. In another case, Mr. Justice James Parke ruled the same way, saying, that a child might breathe before it was born, but that its having breathed was not sufficient to make the killing murder, and that there must have been an independent circulation in the child, or that it could not be considered as alive for this purpose. *Pulley's case*, 5 *C. & P.* 539. See also *R.* v. *Wright*, 9 *C. & P.* 754. So where the prisoner was charged with the murder of her new-born child, by cutting off its head, Coltman, J., held, that in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state, and that the fact of its having breathed was not a decisive proof that it was born alive, as it might have breathed and yet died before birth. *Elizabeth Sellis's case*, 7 *C. & P.* 850. Where an indictment charged, that the prisoner being big with child, did bring forth the child alive, and afterwards strangled it; Parke, B., held, that in order to convict upon an indictment so framed, the jury must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. The learned baron added, that if the jury should be of opinion that the child was strangled intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced, he should direct them to convict the prisoner, and reserve the point, his impression being that it would be murder if those were the facts of the case. The prisoner was acquitted. *Crutchley's case*, 7 *C. & P.* 814; see *Senior's case, post;* also *R. v. Reeves*, 9 *Carr. & P.* 25. In *Trilloe's case*, 2 *Moo. C. C.* 260, it was held that murder may be committed on a child still attached to the mother by the navel string.

It is said by Lord Hale, that if the child be born alive, and afterwards die in consequence of the blows given to the mother, this is not homicide. 1 *Hale, P. C.* 433. And see 5 *Taunt.* 21. But Lord Coke, on the contrary, says, that if the child be born alive, and die of the potion, battery, or other cause, this is murder. 3 *Inst.* 50. The latter is generally regarded as the better opinion, and has been followed by modern text writers. *Hawk. P. C. b.* 1. *c.* 31, *s.* 16; 4 *Bl. Com.* 198; 1 *Russ. by Grea.* 485. See 5 *C. & P.* 541 (*a*). And in conformity with the same opinion, the following case was decided. A person, grossly ignorant, practising midwifery, in attempting to deliver a woman, as soon as the head of the child became visible, broke and compressed the skull, and thereby occasioned its death shortly after it was born. Being indicted for manslaughter, it was objected that the child was not wholly born when the injury was received, but the judge overruled the objection, and the prisoner being convicted, the judges held the conviction right. *Senior's case*, 1 *Moo. C. C.* 346.

Where the indictment was for the murder of "a certain female child, whose name was to the jurors unknown," and it appeared that the child was twelve days old, and that the child's mother had said she should like to have it called "Mary Anne," and on two occasions had called it by that name; the prisoner having been con-

victed, the judges held the conviction right. *Smith's case*, 6 *C. & P.* 151. Where the deceased was described as "George Lakeman Clark," and it was proved, that being a bastard child, he had been baptised "George *Lakeman*," (the name of his reputed father), and there was no evidence that he had obtained, or was called by the mother's name of *Clark*, the variance was held fatal. *Clark's case*, *Russ. & Ry.* 358. With regard to what is sufficient evidence of a child being known by a certain name, it was said by Burrough, J., "It is proved, by one of the witnesses, that she should have known him by that name. It cannot be necessary that all the world should know him by that name, because children of so tender an age are hardly known at all, and are generally called by a Christian name only." *Sheen's case*, 2 *C. & P.* 639. The prisoner was charged with the murder of Eliza Waters, and it appeared that the deceased (who was about ten days old) was her illegitimate child, and the only evidence given of the name was by a witness, who stated, "the child was called Eliza. I took it to be baptised, and said it was Eleanor Waters's child." It being objected that there was no evidence of the child's surname of Waters, Lord Denman, C. J., reserved the point, and the prisoner, who had been convicted, was afterwards pardoned. *Ellen Waters's case*, 7 *C. & P.* 250. An illegitimate child, six weeks old, was baptised on a Sunday, and from that day to the following Tuesday was called by its name of baptism and its mother's surname. Erskine, J., (after consulting Patteson, J.,) held, that the evidence was quite sufficient to warrant the jury in finding that the deceased was properly described by those names in the indictment, which was for murder. *Mary Evans's case*, 8 *C. & P.* 765. Where an indictment against a married woman for the murder of her illegitimate child, stated, that she, "in and upon a certain infant male child of tender age, to wit, of the age of six weeks, and not baptised, feloniously and wilfully," &c., did make an assault, &c. It was objected, that the child being born in wedlock, ought to have been described by the surname of the father, or, at least, to have been described as a certain child to the jurors unknown. The point being reserved for the consideration of the judges, they unanimously held, that the deceased was insufficiently described. *Biss's case*, 8 *C. & P.* 773; *S. C.* 2 *Moo. C. C.* 93. An indictment for the murder of a bastard child, described as Harriet Stroud, is not sustained by proof of a child christened Harriet, and only called by that name, though the mother's name was Stroud. The proper description is Harriet. A child, "whose name is to the jurors unknown," is not "good," because the name of Harriet was known. *R.* v. *Stroud*, 2 *Moo. C. C.* 270; *S. C.* 1 *C. & K.* 187. See *Hick's case*, 2 *Moo. & R.* 302. But where the prisoners were indicted for the murder "of a certain illegitimate male child, then late before born of the body of the said J. H., and the fact as proved in evidence was, that the child had been destroyed by the prisoners almost instantly after its birth; Lord Denman, C. J., held, that the description was sufficient, observing that this was not the case of a party whose name was unknown, but of one who had never acquired a name, and the indictment identified the party by showing the name of its parent. *R.* v. *Mary and Jane Hogg*, 2 *Moo. & R.* 380. This ruling was confirmed by the case of *R.* v. *Sarah Willis*, 1 *Den. C. C. R.* 80. Where a prosecutor has been baptised by one christian name, and confirmed by a different one, and has not acquired the former by common reputation, a description of him in an indictment by such baptismal name is

erroneous. *R.* v. *Bridget Smith*, 1 *Cox, C. C.* 248. Where the indictment charged the prisoner with the murder of "a female bastard child," it was held that proof of its being illegitimate lay upon the prosecutor, but that evidence of the prisoner having told a person, that she had only told of her being with child to the father of it, who had lately got married, was sufficient evidence to support the allegation. *Poulton's case*, 5 *C. & P.* 329.

As to the power of the court to amend for a variance between the indictment and the evidence, see 14 & 15 Vict. c. 100, s. 1, *ante*, p. 107.

Proof that the prisoner was the party killing.] When it has been clearly established, says Mr. Starkie, that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is, of course, for the consideration of the jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally,—1st, To the probable *motive* which might have urged the prisoner to commit so heinous a crime; for, however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect that some motive, and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal. 2ndly, The means and opportunity which he possessed for the perpetrating the offence. 3rdly, His conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence. The case cited by Lord Coke and Lord Hale, and which has already been adverted to, is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances, that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced, and injudicious person, ignorant of the nature of evidence, and unconscious that the truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to deceit and misrepresentation. 4thly, Circumstances which are peculiar to the nature of the crime, such as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence. 2 *Stark. Ev.* 521, *2nd ed.* On a trial for murder, where the case against the prisoner was made up entirely of circumstances; Alderson, B., told the jury, that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty party." *Hodge's case*, 2 *Lew. C. C.* 227.

In order to convict the prisoner of murder it is not necessary to prove that the fatal blow was given by his hand. If he was present, aiding and abetting the fact committed, he is a principal in the felony. The *presence* need not always be an actual immediate standing by, within sight or hearing of the fact. 4 *Bl. Com.* 34. Thus, if several persons set out together, or in small parties, upon

one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged, they are all, if the fact be committed, in the eye of the law present at it. *Foster*, 350. But in order to render a party principal in the felony, he must be aiding or abetting at the fact, or ready to afford assistance if necessary. Therefore, if A. happens to be present at a murder, but takes no part in it, nor endeavours to prevent it, nor apprehends the murderer, this, though highly criminal, will not of itself render him either principal or accessary. *Foster*, 350. But in case of assassination or murder committed in private, the circumstances last stated may be made use of against A., as evidence of consent and concurrence on his part, and in that light should be left to the jury, if he be put upon his trial. *Foster*, 350. Where the prisoner is charged with committing the act himself, and it appears to have been committed in his presence by a third person, the indictment is sustained. Thus, where the indictment charged that the prisoner "with both her hands about the neck of one M. D., suffocated and strangled," &c., and it was doubtful whether the murder was not committed in the prisoner's presence by third persons; Parke, J., in summing up, said, "If you are satisfied that this child came by her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands, for if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment." *Culkin's case*, 5 *C. & P.* 121.

In general, if a man in the prosecution of a *felonious intent* kill another, it will be murder. A. shoots at the poultry of B., and by accident kills a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of the felonious intent; but if it be done wantonly and without that intention, it will be barely manslaughter. *Foster*, 259.

Although where a man goes out with intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it is murder; yet if several go out with a common intent to commit a felony, and death ensues by the act of one of the party, the rest will not necessarily be guilty of murder. If three persons, says Parke, J., go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of *another kind*, such as murder, the two who did not concur in this second felony, will not be guilty of it, notwithstanding it happened while they were engaged with him in the felonious act for which they went out. *Duffey's case*, 1 *Lewin*, *C. C.* 194. Three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by, collared the man at the gate, and asked him what business he had there; whereupon the soldier stabbed him. It was ruled by Holt, C. J., to be murder in him, but that those in the tree were innocent. They came to commit an inconsiderable trespass, and the man was killed on a sudden affray without their knowledge. It would, said Holt, have been otherwise if they had come thither with a general resolution against all opposers. This circumstance, observes Mr. Justice Foster, would have shown that the murder was committed in prosecution of their original purpose. But that not appearing to

have been the case, those in the tree were to be considered as mere trespassers. Their offence could not be connected with that of him who committed the murder. *Foster*, 353. The following is a leading case on this subject. A great number of persons assembled at a house called Sissinghurst, in Kent, and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., A., was known, but the rest were not known, and a warrant was obtained from a justice of the peace, to apprehend the said A. and divers persons unknown, who were altogether in Sissinghurst-house. The constable, with sixteen or twenty other persons, his assistants, went with the warrant to the house, demanded entrance, and acquainted some of the persons within that he was a constable, and came with the justice's warrant, demanding A. and the rest of the offenders who were in the house. One of the persons from within coming out, read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors, but going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away, and being about five roods from the door, several persons, about fifteen in number, issued out, and pursued the constable and his assistants. The constable commanded the peace, but they fell on his company, killing one and wounding others, and they then retired into the house to their companions, of whom A. and one G., who read the warrant, were two. For this A. and G., with those who had issued from the house, and others, were indicted for murder, and these points were resolved by the court of K. B. 1, That although the indictment was that B. gave the stroke, and the rest were present aiding and assisting, and though in truth C. gave the stroke, or it did not appear upon the evidence which of them gave it, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment, for in law it was the stroke of all the party, according to the resolution in *Macally's case* (9 *Co.* 67 *b*). 2, That in this case all that were present and assisting the rioters, were guilty of the death of the party slain, though they did not all actually strike him or any of the constable's company. 3, That those within the house, if they abetted or counselled the riot, were in law present, aiding and assisting, and principals, as well as those that issued out and actually committed the assault, for it was but within five roods of the house and in view of it, and all done as it were at the same instant. 4, That there was sufficient notice that it was the constable, before the man was killed; because he was the constable of the village; and because he notified his business at the door before the assault; and because, after his retreat, and before the man was slain, he commanded the peace. 5, It was resolved that the killing the assistant of the constable was murder, as well as the constable himself. 6, That those who came to the assistance of the constable, though not specially called thereto, were under the same protection as if they had been called to his assistance by name. 7, That though the constable retired with his company upon the non-delivery up of A., yet the killing of the assistant in that retreat was murder; because the retreat was one continued act in pursuance of his office, being necessary when he could not attain the object of his warrant; but principally because the constable, in the beginning of the assault, and before the man was struck, commanded the peace. In the conclusion the jury found nine of the prisoners guilty, and acquitted those within, not because they were absent, but because there was no clear

evidence that they consented to the assault, as the jury thought. *Sissinghurst-house case*, 1 *Hale, P. C.* 461.

Although the criminal intent of a single person, who, without the knowledge or assent of his companions, is guilty of homicide, will not involve them in his guilt, yet it is otherwise where all the party proceed with an intention to commit an unlawful act, and with a resolution at the same time to overcome all opposition by force; for if in pursuance of such resolution, one of the party be guilty of homicide, his companions will be liable to the penalty which he has incurred. *Foster*, 353; *Hawk. P. C. b.* 2, *c.* 29, *s.* 8. A person of the name of John Thom, who called himself Sir William Courtenay, and who was insane, collected a number of persons together, having a common purpose of resisting the lawfully constituted authorities, Thom having declared that he would cut down any constables who came against him. Thom in the presence of the two prisoners afterwards shot an assistant of a constable who came to apprehend Thom, under a warrant. It was held by Lord Denman, C. J., that the prisoners were guilty of murder as principals in the first degree, and that any apprehension that they had of personal danger to themselves from Thom, was no ground of defence for continuing with him after he had so declared his purpose; and also that it was no ground of defence, that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves. *Tyler's case*, 8 *C. & P.* 616. The apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal. *Ibid.*

Proof of the means of killing.] The killing may be by any of the thousand forms of death by which life may be overcome. 4 *Bl. Com.* 196. But there must be a corporal injury inflicted, and therefore if a man by working upon the fancy of another, or by unkind usage, puts another into such a passion of grief or fear, as that he either dies suddenly or contracts some disease, in consequence of which he dies, this is no felony, because no external act of violence was offered of which the law can take notice. 1 *Hale, P. C.* 429. Some modes of killing are enumerated by Lord Hale: 1, By exposing a sick or weak person to the cold. 2, By laying an impotent person abroad so that he may be exposed to and receive mortal harm. 3, By imprisoning a man so strictly that he dies. 4, By starving or famine. 5, By wounding or blows. 6, By poisoning. 7, By laying noxious and noisome filth at a man's door to poison him. 1 *Hale, P. C.* 431.

Forcing a person to do an act which is likely to produce and does produce death, is murder; and threats may constitute such force. The indictment charged, first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window, and thirdly and fourthly, that he threatened to throw her out of the window and to murder her, and that by such threats and violence she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruising received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall, but Heath, J., Gibbs, J., and Bayley, J., were of opinion, that if her death was occasioned partly by blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence, as

would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. *Evan's case*, 1 *Russ. by Grea.* 489; see also *R.* v. *Pitts*, *Carr. & M.* 284.

If a man has a beast which is used to do mischief, and he knowing this, purposely turns it loose, though barely to frighten people, and make what is called sport, and death ensues, it is as much murder as if he had incited a bear or a dog to worry the party; and if, knowing its propensity, he suffers it to go abroad, and it kills a man, even this is manslaughter in the owner. 4 *Bl. Com.* 197; *Palmer*, 545; 1 *Hale, P. C.* 431.

In proving murder by poison, the evidence of medical men is frequently required, and in applying that evidence to the facts of the case, it is not unusual for difficulties to occur. Upon this subject the following observations are well deserving of attention. In general it may be taken that where the testimonials of professional men are affirmative, they may be safely credited; but where *negative*, they do not appear to amount to a disproof of a charge otherwise established by strong, various, and independent evidence. Thus on the view of a body after death, on suspicion of poison, a physician may see cause for not positively pronouncing that the party died by poison; yet, if the party charged be interested in the death, if he appears to have made preparations of poisons without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly and without previous circumstances of ill health; if he has endeavoured to stifle the inquiry by prematurely burying the body, and afterwards, on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm could not be owing to any other cause, the accumulative strength of circumstantial evidence may be such as to warrant a conviction, since more cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that supposing poison to have been employed, stronger demonstrations could not reasonably have been expected, under all the circumstances, to have been produced. *Lofft. in* 1 *Gilb. Ev.* 302. With regard to the law of principal and accessary, there is a distinction between the case of murder by poison and other modes of killing. In general, in order to render a party guilty as principal, it is necessary either that he should with his own hand have committed the offence; or that he should have been present aiding and abetting; but in the case of killing by poison it is otherwise. If A., with an intention to destroy B., lays poison in his way, and B. takes it and dies, A., though absent when the poison is taken, is a principal. So if A. had prepared the poison and delivered it to D. to be administered to B. as a medicine, and D. in the absence of A. accordingly administered it *not knowing that it was poison*, and B. had died of it, A. would have been guilty of murder as principal. For D. being innocent, A. must have gone unpunished, unless he could be considered as principal. But if D. had known of the poison as well as A. did, he would have been a principal in the murder, and A. would have been accessary before the fact. *Foster*, 349; *Kel.* 52; 1 *Russ. by Grea.* 35. An indictment for the murder of A. B. by poison,

stating that the prisoner gave and administered a certain deadly poison, is supported by proof that the prisoner gave the poison to C. D. to administer as a medicine to A. B., but C. D. neglecting to do so, it was accidentally given to A. B. by a child; the prisoner's intention throughout being to murder. *Michael's case*, 2 *Moo. C. C.* 120; *S. C.* 9 *C. & P.* 356.

Whether or not the giving false evidence against another upon a capital charge, with intent to take away his life (the party being executed upon such evidence) will amount to murder appears to be a doubtful point. There are not wanting old authorities to prove that such an offence amounts to wilful murder. *Mirror*, c. 1, s. 9; *Brit.* c. 52; *Bract. l.* 3, c. 4; see also *Hawk. P. C. b.* 1, c. 31, s. 7. But Lord Coke says, "it is not holden for murder at this day." 3 *Inst.* 43. The point arose in *McDaniel's case*, where the prisoners were indicted for wilful murder, and a special verdict was found, in order that the point of law might be more fully considered. But the attorney-general declining to argue the point of law, the prisoners were discharged. *Foster*, 131. The opinion of Sir Michael Foster, who has reported the case, is against the holding the offence to be murder, though he admits that there are strong passages in the ancient writers which countenance such a prosecution. The practice of many ages, however, he observes, by no means countenances those opinions, and he alludes to the prosecutions against Titus Oates, as showing that at that day the offence could not have been considered as amounting to murder, otherwise Oates would undoubtedly have been so charged. *Foster*, 132. Sir W. Blackstone states, on the contrary, that though the attorney-general declined, in *McDaniel's case*, to argue the point of law, yet he has good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons, and that nothing, therefore, should be concluded from the waiving of that prosecution. 4 *Bl. Com.* 196 (*n.*). And it is asserted by Mr. East that he has heard Lord Mansfield say that the opinions of several of the judges at the time, and his own, were strongly in support of the indictment. 1 *East, P. C.* 333 (*n*). Sir W. Blackstone has not given any positive opinion against such an indictment, merely observing that the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the risk of their lives) has not *yet* punished the offence as murder. 4 *Bl. Com.* 197.

Doubts occasionally arise in cases of murder, whether the death has been occasioned by the wound or by the unskilful and improper treatment of that wound. The law on this point is laid down at some length by Lord Hale. If, he says, a man give another a stroke, which, it may be is not in itself so mortal, but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder, as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill applications by the party or those about him, of unwholesome salves or medicines, the party dies, if it clearly appear that the medicine and not the wound was the cause of the death, it seems it is not homicide, but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect, it turn to a gangrene, or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound: for that wound, though it was not

the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causâ causati.* 1 *Hale, P. C.* 428. Neglect or disorder in the person who receives the wound will not excuse the person who gave it. Thus it was resolved, that if one gives wounds to another who neglects the cure of them, and is disorderly, and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter, according to the circumstances of the case, because, if the wounds had not been given, the man had not died. *Rews' case, Kel.* 26. So Maule, J., has held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Joseph Holland's case*, 2 *Moo. & R.* 351. In the above case the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated. At the end of a fortnight lock-jaw came on, the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon gave it as his opinion that if the finger had been amputated at first the deceased's life would most probably have been preserved.

Whether the infliction of a blow which, had the party upon whom it was inflicted been sober, would not have produced death, will, when inflicted upon a person intoxicated and producing death, be deemed murder or manslaughter, may admit of much question. The point arose in the following case:—Upon an indictment for manslaughter, it appeared that the prisoner and the deceased had been fighting, and the deceased was killed. A surgeon stated that a blow on the stomach in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. Hullock, B., directed an acquittal, observing, that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operations of the several causes, and to say with certainty that the death was immediately occasioned by any one of them in particular. His lordship cited from his notes the following case (*Brown's case, April,* 1824): Indictment charged with killing by striking. The jury found that the death was occasioned by over-exertion in the fight. The judges held that the prisoner was entitled to an acquittal. *Johnson's case*, 1 *Lewin, C. C.* 164. It may be doubted how far the ruling of the learned judge in this case was correct, for if by the act of the prisoner the death of the party was accelerated, it seems that the prisoner would be guilty of the felony. See *Martin's case*, 5 *C. & P.*, 130, *post*, p. 695. And although a state of intoxication might render the party more liable to suffer injury from the blows, yet it is difficult to say that the intoxication was the *cause* of his death, any more than the infirmity of age or sickness, which could not, it is quite clear, be so esteemed. Very few decisions are to be found in our own books on this subject, and it may, therefore, be allowable to illustrate it by a reference to a few cases in the Scotch law, which is in principle the same as our own on this point, and to the text writers on the criminal law of that country. It is clear, says Mr. Alison, that if the death be owing not to the effects of the wound, but to a supervening accident or misfortune, though induced by the first violence, the prisoner cannot be convicted of homicide. Thus, if a person be wounded, no matter how severely, yet if he recover and engage in his ordinary occupations, and bear about with him no

apparent seeds of his malady, the assailant cannot afterwards be involved in the consequences of his death, even though it was connected with the previous violence. So it was found in the case of Patrick Kinninmonth, Nov. 2, 1697. *Alison's Prin. Crim. Law of Scot.* 146; 1 *Hume*, 181. So if a person be wounded, but recovers after a long confinement, which induces a consumption which ultimately proves fatal, still the death is here so remotely connected with the original violence that human tribunals cannot consider the one as the cause of the other. *Ib. Burnett*, 550. If, says Mr. Alison, the death be owing not to the natural and accustomed consequences of the injury, but to remote and improbable accidents which have since intervened, the prisoner must be acquitted. *Alison's Prin. Crim. Law of Scot.* 147. The prisoner was gamekeeper to Lord Blantyre, and in the course of the scuffle with a poacher, the latter discharged his piece, which lodged its contents in his thigh. He was carried to the Glasgow infirmary, where erysipelas at the time was extremely prevalent, and having been unfortunately put into a bed formerly occupied by a patient with that disorder, he took it, and died in consequence. Till this supervened the wound bore no peculiarly dangerous symptoms. The public prosecutor strongly contended that if the man had not been fired at, he never would have been exposed to the contagion of the erysipelas, and therefore his death was by a circuitous, but legitimate consequence, owing to the wound; but this was deemed too remote a conclusion, and the prisoner, under the direction of Lords Justices Clerk, Boyle, and Succoth, was acquitted. *Campbell's case, Ibid.* In like manner where the prisoner had thrown a quantity of sulphuric acid in the face of the deceased, and produced such inflammation in the eyes, that bleeding was deemed necessary, and the orifice made by the surgeon inflamed, and of this the party died, but not of the injury in the face, the court held this *second* injury, produced by a different hand, not so connected with the original violence as to support the charge of murder, and the prisoner was convicted of assault only. *Macmillan's case, Ib.* If the death be truly owing to the wound, it signifies not that under more favourable circumstances, and with more skilful treatment, the fatal result might have been averted. 1 *Burnett*, 551; *Alison*, 149. Thus, if an assault be made which opens an artery, it will be no defence to plead that by the assistance of a surgeon the wound might have been stanched and life preserved. 1 *Hume*, 184; *Alison*, 149. The prisoner was one of a party of smugglers who had fired at an officer of excise. The wounded man was carried to the nearest village, where he was attended by a surgeon of the country, who was not deficient in attention, but, fever ensuing, the party died at the end of three weeks. It was objected that by skilful treatment the man might have recovered, but the court said that it was for the prisoner to prove, if he could, that death ensued *ex malo regimine. Edgar's case, Alison*, 149. The true distinction in all such cases is, that if the death was evidently occasioned by grossly erroneous medical treatment, the original author will not be answerable; but if it was occasioned from want merely of the higher skill which can only be commanded in great towns, he will, because he has wilfully exposed the deceased to a risk from which practically he had no means of escaping. Accordingly, where the prisoner was indicted for the culpable homicide of a boy in a manufactory, by striking him on the shoulder which dislocated his arm, it appearing that the arm had been worked upon two days after the blow by an ignorant bone-

setter, whose operations did more harm than good, and that in consequence of the inflammation thus occasioned, acting upon a sickly and scrofulous habit of body, a white swelling ensued which proved fatal, the jury under the direction of Lord Meadowbank acquitted the prisoner. *Macewan's case, Ib.* Though death do not ensue for weeks or months after the injury was received, yet if the wound be severe, and keep in a regular progression from bad to worse, so that the patient continually languishes and is consumed by it, as by a disease, this in reason and law is the same as if he had died on the spot. 1 *Hume*, 185; *Alison's Princ. Cr. Law of Scot.* 151. Thus, where the deceased, a post-boy, was robbed, cut, and left on the ground all night, and death ensued at the end of two months, and it was proved by the medical evidence that the wound, with the cold which the deceased got by lying out all night, and the great loss of blood which followed on it were the cause of his death, the prisoner was convicted of the murder as well as the robbery. *Caldwall's case, Burnett*, 552(*a*); *Alison, Princ.* 151. However feeble the condition of the deceased may have been, and however short his tenure of life, it is equally murder, as if the person killed had been in the prime of youth and vigour. Accordingly, where it appeared that the deceased, a sick and infirm old man, was violently beaten with a pair of tongs, of which in a few hours he died, and it was urged that his death was rather owing to his previous infirm condition than to the assault, it was held to be murder. *Ramsay's case*, 1 *Hume*, 183; *Alison's Princ. Cr. Law of Scot.* 149. The same point lately arose in a case in this country. Upon a trial for manslaughter it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, but Parke, J., in addressing the jury, remarked: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it." *Martin's case*, 5 *C. & P.* 130.

Proof of the means of killing variance in statement.] Where a man is indicted for one species of killing, as by poison, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the means of death proved agree in substance with those charged, it is sufficient. 1 *East, P. C.* 341; 2 *Hale, P. C.* 185: *Kelly's case*, 1 *Moo. C. C. R.* 113. Now by the 14 & 15 Vict. c. 100, s. 4, "In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased."

Proof of malice—in general.] The malice necessary to constitute the crime of murder, is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in the depriving the party of life. The malice prepense, says Blackstone, essential to murder, is not so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart, and it may be either express or implied in law,—express, as

where one, upon a sudden provocation beats another in a cruel and unusual manner, so that he dies, though he did not intend his death; as where a park-keeper tied a boy who was stealing wood, to a horse's tail, and dragged him along the park; and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died. These were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 4 *Bl. Com.* 199. Also, continues the same writer, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. *Id.* 200. The Scotch law resembles our own in this particular, and the rule is well laid down by Baron Hume, "Our practice," he says, "does not distinguish between an absolute purpose to kill and a purpose to do any excessive and grievous injury to the person, so that if the pannel assault his neighbour, meaning to hamstring him or cut out his tongue, or break his bones, or beat him severely, or within an inch of his life; and if in the prosecution of this outrageous purpose, he has actually destroyed his victim, he shall equally die for it, as if he had run him through the body with a sword. The corrupt disregard of the person and life of another, is precisely the dole or malice, the depraved and wicked purpose, which the law requires and is content with." 2 *Hume*, 254, 256.

"Where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder." *Per Tindal, C. J., Greenacre's case*, 8 *C. & P.* 35. And see *ante*, p. 20.

Proof of malice—death ensuing in the performance of an unlawful or wanton act.] The rule in this case is thus laid down by Sir Michael Foster. If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such mischievous intention do not appear, (which is matter of fact to be collected from the circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act which ensued was unlawful. *Foster*, 261. Thus, where an injury intended to be inflicted upon A. by poison, blows, or other means of death, would, had he sustained it, have been murder; it will amount to the same offence, if B. by accident happens to lose his life by it. But on the other hand, if the blow intended for A. arose from a sudden transport of fury, which, in case A. had died by it, would have reduced the offence to manslaughter; the fact will admit of the same alleviation, if B. should happen to fall by the blow. *Foster*, 262; 1 *Hale*, *P. C.* 438. See *Hunt's case*, 1 *Moo. C. C.* 93, *post*, title *Attempt to commit Murder*.

So where two parties meet to fight a deliberate duel, and a stranger come to part them, and is killed by one of them, it is murder in the latter. 1 *Hale, P. C.* 441. And where the prisoner intending to poison his wife, gave her a poisoned apple, which she, ignorant of its nature, gave to a child, who took it and died; this was held murder

in the husband, although, being present, he endeavoured to dissuade his wife from giving it to the child. *Saunders's case, Plowd.* 474; *Vide ante*, p. 208. Such also was the case of the wife who mixed ratsbane in a potion sent by the apothecary to her husband, which did not kill him, but killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. 9 *Co.* 81; *Hawk. P. C. b.* 1, *c.* 31, *s.* 46. So in a recent case, where the prisoner, intending to murder A., shot at and wounded B., supposing him to be A., it was held that he was properly convicted of wounding B. with intent to murder him. *Henry Smith's case*, 25 *L. J. M. C.* 29.

It is not necessary in order to render the killing murder, that the unlawful act intended, would, had it been effected, have been felony. Thus, in the case of the person who gave medicines to a woman, (1 *Hale, P. C.* 429,) and of him who put skewers into a woman's womb, with a view in both cases to procure abortion, whereby the women were killed; such acts were clearly held murder, though the original attempt, had it succeeded, would only have been a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the persons on whom they were practised. 1 *East, P. C.* 230. So if in case of a riot or quarrel, whether sudden or premeditated, a justice of the peace, constable or watchman, or even a private person be slain in endeavouring to keep the peace and suppress the affray, he who kills him is guilty of murder, for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy, as to go on in it, to the hazard of the lives of those who only do their duty, he is, in that respect, equally criminal as if his intention had been to commit felony. *Hawk, P. C. b.* 1, *c.* 81, *s.* 54.

If a person rides a horse known to be used to kick, amongst a multitude of people, although he only means to divert himself, and death ensues in consequence, he will, it is said, be guilty of murder. *Hawk, P. C. b.* 1, *c.* 31, *s.* 61; 1 *Lord Raym.* 143; *Foster*, 261; 1 *East, P. C.* 231. And if a man, knowing that the people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and some one is consequently killed, it is murder, on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was not bent on mischief generally; but if the act were merely done incautiously, it would only be manslaughter. 1 *East, P. C.* 231; 1 *Hale, P. C.* 475; *Vide post*, p. 698. In all these cases the nature of the instrument and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence. 1 *East, P. C.* 257.

The rule above stated must be taken to extend only to such acts as are *mala in se*; for if the act be merely *malum prohibitum*, as (formerly) shooting at game by a person not qualified to keep a gun for that purpose, the case of him so offending will fall under the same rule as that of a qualified person. The mere imposing of penalties will not in a case of this kind change the character of the accident. *Foster*, 259. So if one throw a stone at another's horse, and it hit a person and kill him, it is manslaughter only. 1 *East, P. C.* 257; 1 *Hale, P. C.* 39.

Death ensuing in consequence of a trespass committed in sport will be manslaughter. The prisoners were indicted for manslaughter, in having caused the death of a man by throwing stones down a coal-pit.

Tindal, C. J., in addressing the jury said, if death ensue in consequence of a wrongful act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, and was a trespass. *Fenton's case*, 1 *Lewin, C. C.* 179; see further, *ante*, p. 676.

The Scotch law does not recognise all the nice distinctions which exist in our own upon this head. The rule in that country is stated to be, that homicide, although not originally intended, will be held to be murder, when it takes place during the commission or in the attempt to commit a capital crime, or one obviously hazardous to life, but that where it ensues, without being intended, during the course of an inferior delinquency, and from which no peril to life could have been reasonably anticipated, it will amount to culpable homicide only. *Alison's Princ. Crim. Law of Scotl.* 52. Perhaps the rule with regard to implied malice has been carried, in the English practice, to at least the full length which reason and justice warrant.

Proof of malice—death ensuing in the performance of a lawful act.] Where death is occasioned by the hand of a party engaged in the performance of a lawful act, it may amount either to murder, manslaughter, or mere misadventure, according to the circumstances by which it is accompanied. The most usual illustration of this doctrine is the instance of workmen throwing stones and rubbish from a house in the ordinary course of their business, by which a person underneath happens to be killed. If they deliberately saw the danger or betrayed any consciousness of it, whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death. For though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call for it in the instance put, the rule applies, *de non existentibus et non apparentibus eadem est ratio.* So if any person had been before seen on the spot, but due warning were given, it will be only misadventure. On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street, few persons hear the warning, or sufficiently attend to it, however loud. 1 *East, P. C.* 262; *Foster*, 262; 1 *Hale, P. C.* 472; 4 *Bl. Com.* 192.

Cases of negligent driving fall under the same consideration, and if death ensue it will be murder, manslaughter, or misadventure, according to the caution exercised, and with reference to the place where the injury occurred. It has been already stated that under circumstances indicating a wanton and malicious disregard of human life, the offence may amount even to murder. If there be negligence only in the driver it will be manslaughter, and if negligence be absent it will amount to misadventure merely. If A. drives his cart care-

lessly, and it runs over a child in the street, if A. saw the child, and yet drove upon him, it is murder; if he did not see the child, it is manslaughter; if the child ran across the way, and it was impossible to stop the cart before it ran over the child, it is homicide, *per infortunium*. 1 *Hale, P. C.* 476; *Foster*, 263. So if a boy, riding in a street, puts his horse to full speed and runs over a child and kills him, this is manslaughter, and not *per infortunium;* and if he rides into a press of people with intent to do hurt, and the horse kills one of them, it is murder in the rider. 1 *Hale, P. C.* 476. A. was driving his cart with four horses, in the highway at Whitechapel. He being in his cart, and the four horses at a trot, they threw down a woman who was going the same way, with a burden upon her head, and killed her. Holt, C. J., two other judges, and the recorder, held this to be misadventure only; but per Holt, C. J., if it had been in a street where people usually passed, it had been manslaughter. Upon this case, Mr. East has made the following observation: It must be taken for granted from this note of the case that the accident happened in a highway, *where people did not usually pass*, for otherwise the circumstance of the driver being in the cart and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person that could not get out of the way in time. And indeed such conduct in the driver of such heavy carriages, might, under such circumstances, be thought to betoken a want of due care, if any, though few persons, might probably pass by the same road. The greatest possible care is not to be expected, nor is it to be required, but whoever seeks to excuse himself from having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do. 1 *East, P. C.* 263. The deceased was walking along the road in a state of intoxication. The prisoner was driving a cart drawn by two horses, without reins. The horses were cantering, and the prisoner was sitting in front of the cart. On seeing the deceased, he called to him twice, to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and was killed. Garrow, B., said, that if a man drive a cart at an unusual rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving or any other cause, the person cannot get out of the way time enough, but is killed, the driver is guilty of manslaughter. He added, that it is the duty of every man who drives any carriage, to drive it with such care and caution as to prevent, as far as in his own power, any accident or injury that may occur. *Walker's case.* 1 *C. & P.* 320. What will constitute negligence in the case of driving carriages, must depend greatly upon the circumstances of each particular case. It was ruled by Mr. Justice Bayley, that a carter, by being in the cart instead of at the horse's head, or by its side, was guilty of negligence; and if death ensued, of manslaughter. *Knight's case*, 1 *Lewin, C. C.* 168. And the same point was ruled by Hullock, B. *Anon. Ibid.* And see *Swindall's case, ante*, p. 679. The prisoner was charged with manslaughter. It appeared, that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and was whipping his horses just before his omnibus upset. In summing up to the jury, Patteson, J., said, "The main

questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him." *Timmins's case*, 7 *C. & P.* 499.

To make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there were sufficient light, and the captain of the steamer is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *Per Parke, J., and Alderson, B., Green's case*, 7 *C. & P.* 156. And see *Allen's case, Id.* 153.

The prisoner was indicted for manslaughter, and appeared that it was his duty to attend a steam-engine, and that on the occasion in question he had stopped the engine, and gone away. During his absence, a person came to the spot and put it in motion, and being unskilled, was unable to stop it again; and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, observing, that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner went away, and that it was necessary, in order to a conviction for manslaughter, that the negligent act which caused the death, should be that of the party charged. *Hilton's case*, 2 *Lew. C. C.* 214. See also *Lowe's case, ante*, p. 679.

It is sometimes very difficult to trace the boundaries between manslaughter and misadventure, as in the following case:—A man found a pistol in the street which he had reason to believe was not loaded, he having tried it with the rammer. He carried it home and showed it to his wife, and she standing before him, he pulled the cock and touched the trigger. The pistol went off and killed the woman, and this was ruled to be manslaughter. *Kel.* 41. Admitting, says Mr. Justice Foster, that this judgment was strictly legal, it was, to say no better of it, *summum jus*. But he continues, I think it was not so; for the law in these cases does not require the *utmost* caution that *can* be used; it is sufficient that a reasonable precaution, what is *usual* and *ordinary* in like cases, should be used. *Foster*, 264. Mr. Justice Foster mentions a similar case which occurred before himself; "I once upon a circuit tried a man for the death of his wife by a like accident. Upon a Sunday morning the man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way. But before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was. He, taking it up, touched the trigger, when it went off and killed his wife, whom he tenderly loved. It came out in evidence, that while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game, but before the service at church was ended, restored it, *loaded*, to the place whence it was taken, and where the defendant, ignorant of what had passed, found it, to all appearance, as he had left it. "I did not," says Mr. Justice Foster, "inquire whether the poor man had examined the gun before he carried it

home, but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him, and they did acquit him accordingly." *Foster*, 265.

Parents, masters, and other persons having authority in *foro domestico*, may administer reasonable correction to those under their care, and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of moderation, either in the measure or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances of the case. *Foster*, 262. Thus, where a master struck a child, who was his apprentice, with a great staff, of which he died, it was ruled to be murder. 1 *Hale, P. C.* 474. Speaking of homicides of this class, Mr. Justice Foster says, if they be done with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon likely to kill or maim, it will be murder; due regard being had to the age and strength of the party. *Foster*, 262. Thus where a master directed his apprentice to do some work in his absence, and on his return, finding it had been neglected, threatened to send the apprentice to Bridewell, to which he replied, "I may as well work there, as with such a master," upon which the master, striking him on the head with a bar of iron, which he had in his hand, killed him, it was held murder; for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may kill them; and a bar of iron is not an instrument of correction. *Gray's case, Kel.* 64; 1 *Russ. by Grea.* 548. Though the correction exceed the bounds of moderation, yet the court will pay regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument is not such as will, in all probability, occasion death, though the party be hurried to great excess. A father, whose son had been frequently guilty of thefts, of which complaints had been made, had often corrected him. At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father in a passion, beat his son, by way of chastisement, with a rope, by reason of which he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the prisoner, after consulting his colleague and the principal counsel on the circuit, ruled this to be manslaughter only. *Anon.* 1 *East, P. C.* 261.

As to manslaughter committed by the captain and mate of a vessel on one of the crew, see *Leggett's case*, 8 *C. & P.* 191.

Where death ensues in the case of sports or recreations, such recreations being innocent and allowable, it falls within the rule of excusable homicide, because bodily harm is not the motive on either side. *Foster*, 250; 1 *East, P. C.* 268. Therefore persons playing at cudgels, *Comb.* 408, or foils or wrestling, *Lane's case*, 1 *East, P. C.* 268, are excusable, if death ensue. Lord Hale appears to be of a different opinion. He says, regularly, he that voluntarily and knowingly *intends hurt to the person of a man*, though he intends not death, yet if death ensue, it excuses not from the guilt of murder or manslaughter at least, as if A. intends to beat B., but not to kill him, yet if death ensue, this is not *per infortunium*, but murder or manslaughter, as the circumstances of

the case happen; and *therefore*, he continues, I have known it ruled, that if two men are playing at cudgels together, or wrestling, by consent, if one by a blow or fall kills the other, it is manslaughter, and not *per infortunium*, as Mr. Dalton (*cap.* 90,) seems to doubt it; and accordingly it was, *P.* 2, *Car.* 2, by all the judges, upon a special verdict, from Newgate, where two friends were playing at foils at a fencing school, and one casually killed the other, resolved to be manslaughter. 1 *Hale, P. C.* 472. The question in these cases appear to be twofold, 1st, whether the sport was lawful, and 2nd, whether the parties engaged in it with a friendly mind, or with intent to do each other some bodily harm. The cases mentioned by Lord Hale seem to proceed upon the latter supposition, and on this ground they are distinguished by Mr. Justice Foster, from the case of persons who in perfect friendship engage by mutual consent in recreations for the trial of skill or manhood, or for improvement in the use of arms. *Foster*, 259, 260; 1 *East, P. C.* 268. But if there be dangerous weapons used in such sports, and there be any negligence in the use of them, and one of the parties be killed, such negligence may render the act manslaughter. Sir John Chichester, fencing with his servant, made a pass at him, which the servant parried off with a bedstaff. In the heat of the exercise, the chape of the scabbard flew off, and the man was killed by the point of the sword. It was held that this was manslaughter, because, though the act which occasioned the death intended no harm, nor could it have done harm, if the chape had not been struck off by the party killed, and though the parties were in sport, yet the act itself, the thrusting at the servant, was unlawful. *Aleyn*, 12; 1 *Hale, P. C.* 472. Mr. Justice Foster puts this decision on another ground, observing that the party did not use the degree of circumspection which common prudence would have suggested; and therefore the fact so circumstanced might well amount to manslaughter. *Foster*, 260; 1 *East P. C.* 269.

Death in the course of a friendly contest may also amount to manslaughter, if any undue advantage has been taken. Thus, if two persons are engaged to play at cudgels, and one of them makes a blow at the other likely to hurt, before he was upon his guard, and without warning, and death ensues, the want of due and friendly caution would make the act amount to manslaughter. 1 *East, P. C.* 269.

Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, if death casually ensue, it is only misadventure. 1 *East, P. C.* 269. Therefore, if a person be shooting at game or butts, or other lawful object, and a bystander be casually killed, it is only misadventure. 1 *Hale, P. C.* 38, 39, 472; 1 *East, P. C.* 269. But if the sport or recreation be unlawful, and death ensues in the course of it, it will be murder or manslaughter, according to the circumstances of the case. Thus, where a man playing at the diversion of cock-throwing at Shrove-tide, missed his aim, and a child looking on, received a blow from the staff, of which he died, Mr. Justice Foster (who observes that this is a barbarous, unmanly custom, productive of great disorders, and dangerous to bystanders), ruled it to be manslaughter. *Foster*, 261.

Prize-fights, public boxing matches, and the like, exhibited for the sake of lucre, are not lawful sports, for they serve no valuable purpose, but on the contrary, encourage a spirit of idleness and debauchery. *Foster*, 260. In such case the intention of the parties is not innocent

in itself, each being careless of what hurt may be given, provided the promised reward be obtained; and besides, such meetings have in their nature a strong tendency to a breach of the peace. Therefore in *Ward's case*,* who was challenged to fight by his adversary, for a public trial of skill in boxing, and was also urged to engage by taunts; although the occasion was sudden, yet having killed his opponent, he was held guilty of manslaughter. 1 *East, P. C.* 270. So persons present at a prize-fight encouraging it by their presence will, in case of death, be guilty of manslaughter. Upon an indictment for murder, charging the prisoner with being present aiding and abetting, it appeared that there had been a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled; who had sticks, which they used with great violence. The deceased died in consequence of the blows he received on this occasion. There was contradictory evidence as to the prisoner having acted as second. In summing up, the judge (Mr. Justice Littledale) said "my attention has been called to the evidence that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence; I mean if they remained present during the fight. If they were not merely casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. But if the death ensued by violence unconnected with the fight itself, that is by blows not given by the other combatant, but by persons breaking in the ring and striking with their sticks, those who were merely present, are not, by being present, guilty of manslaughter. The case is at most one of manslaughter only." *Murphy's case*, 6 *C. & P.* 103. It has been ruled, however, that persons present at a fatal prize-fight are not such accomplices as that their evidence requires confirmation. *Hargrave's case*, 4 *C. & P.* 170.

Where death casually ensues in the course of a lawful employment, and there is a want of due caution on the part of the person from whom it proceeds, it will not be misadventure but manslaughter. A. having deer frequenting his corn-field out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and B. his servant to watch in another corner of the field with a gun, charging him to shoot when he heard the deer rustle in the corn. The master himself improvidently rushed into the corn, when the servant supposing it to be the deer, shot and killed his master. This was held to be only chance medley, for the servant was misguided by the master's own directions. But it seemed to Lord Hale, who tried the prisoner, that if the master had not given such directions, it would have been manslaughter to have shot a man, though mistaking him for a deer, because he did not use due diligence to discover his mark. 1 *Hale, P. C.* 476.

An iron founder being employed by an oilman and dealer in marine stores to make some cannon, to be used on a day of rejoicing, and afterwards to be put into a sailing-boat, after one of them had burst, and had been returned to him in consequence, sent it back in so imperfect a state, that on being fired it burst again, and killed the deceased; on his trial before Bayley, B., Patteson, J., and Gurney, B., he was found guilty of manslaughter. *Carr's case*, 8 *C. & P.* 163.

Proof of malice—death ensuing in the performance of a lawful act—

persons administering medicines.] Cases of great difficulty and nicety have arisen with regard to the question of malice, where medicines have been carelessly or unskilfully administered by incompetent persons. The law on this subject is thus laid down by Lord Hale—"If a physician gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician, it kills him, this is no homicide, and the like of a surgeon. And I hold their opinion to be erroneous that think, if it be no licensed surgeon or physician that occasions this mischance, then it is a felony, for physic and salves were before licensed physicians and surgeons, and therefore, if they be not licensed according to the statutes, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter." 1 *Hale, P. C.* 429. Upon the latter point Sir William Blackstone appears to concur in opinion with Lord Hale. If a physician or surgeon, he says, gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it has been held that if he be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir M. Hale very justly questions the law of this determination. 4 *Bl. Com. c.* 14. The correctness of Sir M. Hale's opinion has been recognised in several late cases. Thus, in *Van Butchell's case*, 3 *C. & P.* 632, Hullock, B., ruled that it made no difference whether the party was a regular or an irregular surgeon, adding that in remote parts of the country many persons would be left to die if irregular surgeons were not allowed to practise. The same opinion was expressed by Park, J., in a subsequent case, in which he observed that whether the party was licensed or unlicensed is of no consequence except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or acts of parliament. *Long's case*, 4 *C. & P.* 398. But whether the party be licensed or unlicensed, if he display gross ignorance, or criminal inattention, or culpable rashness, in the treatment of his patient, he is criminally responsible. There is no doubt, says Mr. Baron Hullock, that there may be cases where both regular and irregular surgeons may be liable to an indictment, as there may be cases where from the manner of the operation even malice might be inferred. *Van Butchell's case*, 3 *C. & P.* 633; 4 *C. & P.* 407. Where a person who, though not educated as a surgeon, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman in childbirth, in consequence of which she died, was indicted for the murder, Lord Ellenborough said there has not been a particle of evidence adduced that the prisoner was guilty of murder, but it was for the jury to consider whether the evidence went so far as to make out a case of manslaughter. To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these was necessary to make him guilty of that criminal negligence and misconduct which are essential to make out a case of manslaughter. *Williamson's case*, 3 *C. & P.* 635. This ruling was cited with approbation by Park, J., in *Long's case*, 4 *C. & P.* 407, where he held that to support the charge of manslaughter it must appear that there was gross ignorance or inattention to human

life. In *Long's case*, 4 *C. & P.* 404, a case was cited by counsel, as having occurred on the northern circuit, where a man who was drunk went and delivered a woman, who by his mismanagement died, and he was sentenced to six months' imprisonment. And where a person grossly ignorant undertook to deliver a woman and killed the child in the course of the delivery, it was resolved by the judges that he was rightly convicted of manslaughter. *Senior's case*, 1 *Moo. C. C.* 346. The rule with regard to the degree of misconduct which will render a person practising medicine criminally answerable is thus laid down by Mr. Justice Bayley. "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying, that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." *Long's case*, 4 *C. & P.* 440. The prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool infirmary as cured, after undergoing salivation, and that he was recommended by another patient to go to the prisoner for an emetic, to get the mercury out of his bones. The prisoner was an old woman, residing in Liverpool, who occasionally dealt in medicines. She gave him a solution of corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland and had gone back again. Mr. Justice Bayley, in addressing the jury, said, "I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid ought to be obtained, undertakes to administer medicines which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequences in a case where medical assistance may be obtained. If he does so, it is at his own peril. It is immaterial whether the person administering the medicine prepares it, or gets it from another." *Simpson's case*, *Wilcock on laws of Med. Prof. Appendix*, 227, 4 *C. & P.* 407; (*n.*), 1 *Lewin*, *C. C.* 172. The prisoner was indicted for manslaughter. It appeared that the deceased, a child, being affected with a scald head, the prisoner had directed a plaister to be applied, from the effects of which the child was supposed to have died. Bolland, B., addressing the jury, said, "The law, as I am bound to lay it down, as it has been agreed upon by the judges (for cases of this kind have occurred of late more frequently than in former times), is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." *Spiller's case*, 5 *C. & P.* 333. The direction given by Tindal, C. J., in a case of this kind, where the prisoner was charged with neglecting to attend and take due care of a woman during her delivery, was as follows: "You are to say, whether in the execution of the duty which the prisoner had undertaken to perform, he is proved to have shown such a *gross* want of care, or such a *gross* and *culpable* want of skill, as any person undertaking such a charge ought not to be guilty of, and that the

death of the person named in the indictment was caused thereby." *Ferguson's case*, 1 *Lewin*, *C. C.* 181. In a case which occurred before Lord Lyndhurst, C. B., upon an indictment for manslaughter (by administering Morison's pills), the law on this subject was thus laid down by his lordship: "I agree that in these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person, totally ignorant of the science of medicine, takes upon himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I had the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *Rex* v. *Williamson*, *ante*, p. 704. I shall leave it to the jury to say, whether death was occasioned or accelerated by the medicines administered, and if they say it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicines, he acted either with a criminal intention, or from any gross ignorance." *Webb's case*, 1 *Moo. & Rob.* 405; 2 *Lew. C. C.* 196, *S. C.* The prisoner, who was indicted for manslaughter, had, for nearly thirty years, carried on the business of an apothecary and man-midwife in the county of York, and was qualified by law to carry on that profession. His practice was very considerable, and he had attended the deceased on the birth of all her children. It appeared that on the occasion in question, he made use of a metal instrument, known in midwifery by the name of a *vectis*, or *lever*, inflicting thereby such grievous injuries on the person of the deceased as to cause her death within three hours. It was proved by the medical witnesses that the instrument was a very dangerous one, and that at that period of the labour it was very improper to use it at all; and also, that it must have been used in a very improper way, and in an entirely wrong direction. Coleridge, J., told the jury that the questions for them to decide were, whether the instrument had caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the jury thought that in this instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty. The prisoner was convicted. *R.* v. *Spilling*, 2 *Moo. & R.* 107. A chemist, likewise, who negligently supplies a wrong drug, in consequence of which death ensues, is guilty of manslaughter. The apprentice to a chemist, by mistake delivered a bottle of laudanum to a customer, who asked for paregoric; and a portion of the laudanum being administered to a child, caused its death. The apprentice being indicted for manslaughter, Bayley, J., directed the jury, that if they thought him guilty of negligence, they should find him guilty of the manslaughter. *Tessymond's case*, 1 *Lewin*, *C. C.* 169. See also *Carr's case*, *ante*, p. 703.

Proof of malice—intent to do bodily injury—death ensuing.] If a man assault another with intent to do him a bodily injury, and death ensue, malice sufficient to constitute murder will be presumed, provided the act be of such a nature, as plainly, and in the ordinary course of events, must put the life of the party in danger. 4 *Bl. Com.* 200. A remarkable case, which may be classed under this head, is mentioned by Mr. Alison. The deceased, a chimney-sweeper's boy, of eleven years of age, stuck fast in a chimney. The prisoner having fastened ropes round the leg of the deceased, drew them with such force, that, notwithstanding his cries, and the remonstrances of those present, the boy died. Being charged with this as murder, the presiding judge, Lord Justice Clerk, with the concurrence of the court, laid it down as clear law, that this was an instance of absolute recklessness, and utter indifference about the life of the sufferer, and that the law knew no difference between the guilt of such a case and that of an intention to destroy. *Rae's case, Alison's Prin. Cr. Law. Scotl.* 4.

Proof of malice—exposure of infants, &c.—killing by neglect, &c.] Amongst the modes of killing mentioned by Lord Hale, are the exposing a sick or weak person or infant to the cold, with the intent to destroy him, and laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it and kills it. 1 *Hale, P. C.* 431, 432. In these cases the offence may amount to wilful murder, under the rule that he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense. 1 *East, P. C.* 225. Such was the case of the man who carried his sick father against his will, in a severe season, from town to town, by reason whereof he died. *Hawk. P. C. b.* 1, *c.* 31, *s.* 5; 2 *East. P. C.* 225. See *Stockdale's case,* 2 *Lev. C. C.* 220.

Cases of this kind have arisen, where apprentices or prisoners have died in consequence of the want of sufficient food and necessaries, and where the question has been whether the law would imply such malice in the master or gaoler, as is necessary to make the offence murder. The prisoner, Charles Squire, and his wife, were both indicted for the murder of a parish apprentice, bound to the former. Both the prisoners had used the deceased in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that, in his opinion, the boy died from debility and for want of proper food and nourishment, and not from the wounds he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with food, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty, and executed. *Squire's case,* 1 *Russ. by Grea.* 490. The not supplying an apprentice with sufficient food is an indictable misdemeanor. *Friend's case, Russ. & Ry.* 20. As to what is sufficient proof of the apprenticeship, see *R.* v. *Plummer, Carr, & M.* 597.

Where a married woman was charged with the murder of her illegitimate child, three years old, by omitting to supply it with proper food; Alderson, B., held that she could not be convicted

unless it was shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. The learned judge said, "There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and according to the case before Mr. Justice Lawrence (*Squire's case, supra*), can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband." *Saunders's case*, 7 *C. & P.* 277. But in the case of an infant, the mother would be liable if the death arose from her not suckling the child when she was capable of doing so. *Per Patteson, J., Edwards's case*, 8 *C. & P.* 611. In such a case, the indictment must state that it was the duty of the prisoner to supply the child with food, otherwise it will be bad. *Ibid.*

The prisoner, an unmarried woman, left Worcester in a stage-waggon, and was in the waggon about ten at night at the Wellington Inn on the Malvern Hills. She must have subsequently left the waggon, as she overtook it at Ledbury. It appeared that she had been delivered of a child at the road-side between the Wellington Inn and Ledbury, and had carried it about a mile to the place where it was found, which was also at the road-side. The road was much frequented, and two waggon teams and several persons were on it about the time when the child was left. A waggoner, who was passing along the road, heard the child cry, but went on without rendering it any assistance. Having told some other persons, they proceeded to the spot, and found the child, which was quite naked, dead from cold and exhaustion. It further appeared, that the prisoner had arranged with a woman to be confined at her house, and to pay her 3*s.* 6*d.* a week for taking care of the child. Coltman, J., in summing up to the jury, said, "Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that if death ensued it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath for instance, what inference could be drawn but that the party left it there in order that it might die. This is a sort of intermediate case, because the child is exposed on a public road where persons not only might pass, but were passing at the time, and you will therefore consider whether the prisoner had reasonable ground for believing that the child would be found and preserved." *R.* v. *Ann Walters, Carr. & M.* 164. See also *Sarah Waters's case*, 1 *Den. C. C. R.* 356; *S. C.* 18 *L. J. M. C.* 53, *ante*, p. 679. The prisoner was indicted for the murder, and was also charged on the coroner's inquisition with the manslaughter, of Sarah Jane Cheeseman, by beating her, and compelling her to work for unreasonable hours and beyond her strength. The prisoner was aunt to the deceased, who was about fifteen, and with her sister, who was two or three years younger, their mother being dead, had been placed under the prisoner's care. The prisoner employed them both in stay-stitching, for fourteen and sometimes fifteen hours a day, and when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in ill health, and did not do so much work as her younger sister, and in consequence was much oftener and more cruelly punished by the prisoner, who accompanied her corrections by the use of very violent

and threatening language. The surgeon who examined the deceased stated before the coroner, that, in his opinion, she died from consumption, but that her death was hastened by the treatment she was said to have received. It appeared that the prisoner, when she beat the deceased for not doing her work, always said she was sure that she was acting the hypocrite, and shamming illness, and that she had a very strong constitution. The prisoner having pleaded guilty to the charge of manslaughter, the counsel for the prosecution declined to offer any evidence upon the charge of murder, thinking there was not proof of malice sufficient to constitute that offence, in which opinion Vaughan, B., concurred. *Cheeseman's case*, 7 *C. & P.* 455.

Huggins, the warden of the Fleet, appointed Gibbons his deputy, and Gibbons had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. Barnes put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, chamber-pot, or other convenience. Barnes knew the state of the room, and for fifteen days at least before the death of Arne, Huggins knew its condition, having been once present, seen Arne, and turned away. By reason of the duress of imprisonment, Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. These facts appearing on a special verdict, the court were clearly of opinion that Barnes was guilty of murder. They were deliberate acts of cruelty, and enormous violations of the trust reposed by the law in its ministers of justice; but they thought Huggins not guilty. It could not be inferred from the bare seeing the deceased once during his confinement, that Huggins knew his situation was occasioned by improper treatment, or that he consented to the continuance of it. They said it was material that the species of duress by which the deceased came by his death, could not be known by a bare looking in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life, and it was likewise material that no application had been made to him, which, perhaps, might have altered the case. Besides the verdict found that Barnes was the servant of Gibbons, and Gibbons had the actual management of the prison, and the judges seemed to think that the accidental presence of the principal would not amount to a revocation of the deputy's authority. *Huggins's case*, 2 *Str.* 882; *Foster*, 322; 1 *East*, *P. C.* 331. So where a gaoler, knowing that a prisoner, infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, against his will, in the same room, and the latter prisoner, who had not had the distemper (of which the gaoler had notice), caught it, and died of it, it was held to be murder in the gaoler. *Castell* v. *Bambridge*, 2 *Str.* 856; *Foster*, 322; 1 *East*, *P. C.* 331.

But where the death ensues from incautious neglect, however culpable, rather than from any actual malice or artful disposition to injure, or obstinate perseverance in doing an act necessarily attended with danger, regardless of its consequences, the severity of the law, says Mr. East, may admit of some relaxation, but the case must be strictly freed from the latter incidents. 1 *East*, *P. C.* 226. An apprentice returned from Bridewell, whither he had been sent for bad behaviour, in a lousy and distempered condition, and his master

did not take the care of him which his situation required, and which he might have done. The apprentice was not suffered to lie in a bed, on account of the vermin, but was made to lie on boards without any covering, and no medical aid was procured. The boy dying, the master was indicted for wilful murder, and the medical men who were examined were of opinion that his death was most probably occasioned by his previous ill-treatment in Bridewell, and the want of care when he went home. And they were inclined to think that had he been properly treated when he came home, he might have recovered. There was no evidence of personal violence or want of sufficient sustenance. The recorder left it to the jury to consider whether the death was occasioned by ill-treatment of the prisoner, and if so, whether the ill-treatment amounted to evidence of malice, in which case it would be murder. At the same time they were told, with the concurrence of Mr. Justice Gould and Mr. Baron Hotham, that if they thought otherwise, yet as it appeared that the prisoner's conduct towards the apprentice was highly blameable and improper, they might, under all these circumstances, find him guilty of manslaughter, which they accordingly did, and the judges afterwards approved of the conviction. *Self's case*, 1 *East*, *P. C.* 226; 1 *Russ. by Grea.* 490.

The deceased, Mrs. Warner, was about seventy-four years of age and lived with a sister until the death of the latter, in March, 1837. The prisoner attended the funeral of the sister, and after it was over, stated that the deceased was going to live with him until affairs were settled, and that he would make her happy and confortable. Other evidence was given to show that the prisoner had interfered in her affairs, and had undertaken to provide her with food and necessaries as long as she lived. It appeared that, after July, no servant was kept, but the deceased was waited upon by the prisoner and his wife. The kitchen in which the deceased lived had a large window, through which persons in the court could see plainly what was passing within, and could converse with the inmates of it. Several witnesses swore, that, after the servant left, the deceased remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together, and that on several occasions she complained of being confined, and cried to be let out. They also stated, that in cold weather they were not able to discern any fire in the kitchen, and it appeared that for some time before the deceased's death, she was not out of the kitchen at all, but was kept continually locked in there. The prisoner's wife was the only person who was with the deceased about the time of her death, which happened in February, 1838. An undertaker's man, who was called in very soon after, stated, that from the appearance of the body he thought she had died from want and starvation. A medical witness said, that there was great emaciation of the body, and the stomach and bowels were empty and collapsed, but that the immediate cause of death was water on the brain, which he seemed to think might be caused by want of food. In summing up to the jury, Patteson, J., said, "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which happened of this description have been generally cases of children and servants, where the duty has

been apparent. This is not such a case; but it will be for you to say, whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." After referring to the statements of some of the witnesses, the learned judge continued: "This is the evidence on which you are called on to infer, that the prisoner undertook to provide the deceased with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible." The prisoner was found guilty of manslaughter. *Marriott's case*, 8 *C. & P.* 425. As to the duty of a husband to supply his wife with shelter, see *Plummer's case*, 1 *C. & K.* 600.

Proof of malice—provocation in general.] It frequently becomes a most important question in the proof of malice, whether the act was done under the sudden influence of such a degree of provocation, as to reduce the crime from murder to manslaughter. The indulgence shown to the first transport of passion in these cases, says Mr. Justice Foster, is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders the man deaf to the voice of reason. The provocation therefore, which extenuates in the case of homicide, must be something which the man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed, not what time or accident may afterwards bring to light. *Foster*, 315. Wherever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation, and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder; for in no instance can the party killing alleviate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice. 1 *East, P. C.* 232. Where the provocation is sought by the prisoner, it cannot furnish any defence against the charge of murder. Thus where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him, on which B. strikes, and A. kills him, this is murder. 1 *East, P. C.* 239. A. and B. having a difference, A. bade B. take a pin out of his (A.'s) sleeve, intending thereby to take an occasion to strike or wound B.; B. did so accordingly; on which A. struck him a blow of which he died. It was held that this was wilful murder. 1, Because it was no provocation, since it was done with the consent of A.; and 2, because it appeared to be a malicious and deliberate artifice to take occasion to kill B. 1 *Hale. P. C.* 457.

Proof of malice—provocation by words or gestures only.] Words of reproach how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; neither are indecent or provoking actions or gestures, expressive of contempt or reproach, sufficient, without an assault upon the person. But a distinction is to be observed, where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill. or do some great bodily harm, in which case it will be murder, and the case where he strikes with a stick or other weapon, not likely to kill, and unluckily, and against his intention, does kill, in which latter case it

will only be manslaughter. *Foster*, 290, 291. Where the deceased, coming past the shop of the prisoner, distorted his mouth and smiled at him, upon which the prisoner killed him, it was held to be murder, for it was no such provocation as would abate the presumption of malice in the party killing. *Brain's case*, 1 *Hale, P. C.* 455. If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall,) takes the wall of A., and thereupon A. kills him, this is murder; but if he had jostled A., this jostling had been a provocation, and would have made it manslaughter; so it would if A. riding on the road, B. had whipped the horse of A. out of the track, and then A. had alighted and killed B., which would have been manslaughter. 1 *Hale, B. C.* 455, 456. Upon the former case it had been observed that it probably supposes considerable violence and insult in the jostling. 1 *Russ. by Grea.* 514 (*f*). If there be a chiding between husband and wife, and the husband thereupon strikes his wife with a pestle, and she dies, this is murder, and the chiding will not be a provocation to reduce it to manslaughter. 1 *Hale, P. C.* 457. In the following case the distinction taken by Mr. Justice Foster, in the passage cited at the commencement of the present paragraph came in question. A. drinking in an alehouse, B., a woman, called him "a son of a whore," upon which A. taking up a broomstick at a distance, threw it at her, which hitting her upon the head, killed her; and whether this was murder or manslaughter was the question. Two points were propounded to the judges at Serjeants' Inn; 1, Whether bare words, or words of this nature, will amount to such a provocation as will extenuate the offence into manslaughter. 2, Admitting that it would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether *this* striking, which was so improbable to cause death, will not alter the case. The judges not being unanimous in their opinions upon the point, a pardon was recommended. 1 *Hale, P. C.* 456. In one case the judges are said to have resolved, that words of menace or bodily harm, would come within the reason of such a provocation, as would make the offence manslaughter only. *Lord Morley's case*, 1 *Hale, P. C.* 456. But in another report of the same case this resolution does not appear. *Kel.* 55. And it seems that in such case the words should be accompanied by some act denoting an intention of following them up by an actual assault. 1 *East, P. C.* 233; 1 *Russ. by Grea.* 515. See *R.* v. *Sherwood, ante*, p. 674.

Proof of malice—provocation—assault.] Although, under circumstances, an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will as a matter of course, reduce the crime to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder notwithstanding such provocation. Barbarity, says Lord Holt, (*Keate's case, Comb.* 408,) will often make malice. 1 *East, P. C.* 234; 1 *Russ. by Grea.* 515. There being an affray in the streets, the prisoner, a soldier, ran towards

the combatants. The deceased, seeing him, exclaimed, "You will not murder the man will you?" The prisoner replying, "What is that to you, you bitch?" the deceased gave him a box on the ear, upon which the prisoner struck her on the breast with the pommel of his sword. She fled, and the prisoner pursuing her, stabbed her in the back. Holt, C. J., was first of opinion that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the blow on the ear. But it afterwards appearing that the deceased had struck the prisoner a blow in the face with an iron patten, which drew a great deal of blood, it was held only manslaughter. *Stedman's case, Foster*, 292; 1 *East, P. C.* 234. The smart of the wound, adds Mr. Justice Foster, and the effusion of the blood might possibly keep his indignation boiling till the moment of the fact. *Ibid.* A quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier, who had before driven part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him, he struck at them with the flat side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned he asked whether they had murdered his comrade; but being again several times assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed, the prisoner went up to him, and struck him on the head with the sword, of which he presently died. This was held manslaughter; it was not murder, as the jury had found, because there was a previous provocation, and the blood was heated in the contest; nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner. *Brown's case*, 1 *East, P. C.* 245.

A gentleman named Luttrell being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent for the attorney's bill. Words arose at the lodgings about *civility money*, and Luttrell went up stairs to fetch money for the payment of debt and costs. He soon returned, with a brace of loaded pistols in his bosom, which, on the importunity of his servant, he laid down on the table, saying he did not intend to hurt the officers, but he would not be illused. The officer who had been sent for the bill arriving, and some angry words passing, Luttrell struck one of the officers in the face with a walking cane and drew a little blood, whereupon both of them fell upon him, one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death's wound. This was held manslaughter, by reason of the first assault by the cane. Such is the report of the case given by Sir J. Strange, upon which Mr. Justice Foster has observed what an extraordinary case it is—that all these circumstances of aggravation, two to one, being helpless on the ground, and begging for mercy, stabbed in nine places, and then despatched with a pistol,—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. The learned judge proceeds to state that in the printed trial (*St. Tr.* 195,) there are some circumstances which have been

entirely dropped, and others very slightly mentioned by the reporter. 1, Mr. Luttrell had a sword by his side which, after the affray was over, was found drawn and broken. How that happened did not appear in evidence. 2, When Luttrell laid the pistols on the table, he declared that he brought them because he would not be forced out of his lodgings. 3, He threatened the officers several times. 4, One of the officers appeared to be wounded in the hand with a pistol shot, (both the pistols being discharged in the affray,) and slightly on the wrist with some sharp pointed weapon, and the other was slightly wounded in the hand with a like weapon. 5, The evidence touching Luttrell's begging for mercy, was not that he was on the ground begging for mercy, but that on the ground he held up his hands as if begging for mercy. The chief justice directed the jury, that if they believed Luttrell endeavoured to rescue himself (which he seemed to think was the case, and which adds, Mr. Justice Foster, probably was the case), it would be justifiable homicide in the officers. However, as Luttrell gave the first blow, accompanied with menaces to the officers, and the circumstances of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to do if the debt had not been paid or bail given, he declared it could be no more than manslaughter. *Reason's case, Foster*, 293; 1 *Str.* 499; 1 *East, P. C.* 320.

Two soldiers, having a recruit in a room under their care, who wished to leave them, one of them stationed himself at the door with his sword drawn, to prevent ingress or egress, and a person wishing to enter the room (which was a public-house, kept by his father), was resisted by the soldier at the door, whereupon a struggle ensuing, the other soldier, coming out, struck the party struggling, with his bayonet in the back. Being indicted for stabbing with intent to murder, and convicted, the judges, on a reference to them, held the conviction right, the soldiers having no authority to enlist; and they said that it would have been murder if death had ensued. *Longden's case, Russ. & Ry.* 228.

Under this head may be mentioned the cases of peace officers endeavouring to arrest without proper authority, the killing of whom will not, unless the party can retreat, amount to murder; the attempt to make an unlawful arrest being considered a sufficient provocation. *Curvan's case*, 1 *Moo. C. C.* 132; and see all the cases stated, *post.*

Proof of malice—provocation—instrument used.] In considering the question of malice where death has ensued after provocation given by the deceased in assaulting the prisoner, or upon other provocation, especial attention is to be paid to the nature of the weapon with which death was inflicted. If it was one likely to produce that result, as used by the prisoner he will be presumed to have used it with the intention of killing, which will be evidence of malice; if, on the contrary, it was a weapon not likely to produce death, or calculated to give a severe wound, that presumption will be wanting. It must be admitted to be extremely difficult to define the nature of the weapons which are likely to kill (*Ld. Raym.* 1498); since it is rather in the mode in which the weapon is used, than in the nature of the weapon itself, that the danger to life consists. Accordingly, the decisions upon this head are far from being satisfactory, and do not lay down any general rule with regard to the nature of the weapons. In one instance, Mr. Justice Foster takes a nice distinction with regard to the size of a cudgel.

The observations arise upon *Rowley's case*, 12 *Rep.* 17; 1 *Hale, P. C.* 453; which was as follows:—The prisoner's son fights with another boy, and is beaten. He runs home to his father all blood, and the father takes a staff, runs three quarters of a mile, and beats the other boy, who dies of the beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion.* "Surely," said Mr. Justice Foster, "the provocation was not very grievous: the boy had fought with one who happened to be an overmatch for him, and was worsted. If, upon this provocation, the father, after running three quarters of a mile, had set his strength against the child, and despatched him with a hedge-stake, or any other deadly weapon, or by repeated blows with the cudgel, it would, in my opinion, have been murder; since any of these circumstances would have been a plain indication of the *malitia*, the mischievous, vindictive motive before explained." But with regard to these circumstances, with what weapon, or to what degree the child is beaten, Coke is totally silent. But Croke (*Cro. Jac.* 296,) sets the case in a much clearer light. His words are:—"Rowley struck the child with a small cudgel [*Godbold*, 182, *calls it a rod*,] of which stroke he afterwards died." "I think," continues Foster, "it may be fairly collected by Croke's manner of speaking, that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*, the malignity of heart attending the fact already explained, and therefore manslaughter. I observe Lord Raymond lays great stress on the circumstance that the stroke was with a cudgel not likely to kill." *Ld. Raym.* 1498; *Foster*, 294. The nature of the instrument used, as being most material on the question of malice, was much commented upon in the following case. It was found upon a special verdict that the prisoner had directed her daughter-in-law, a child of nine years old, to spin some yarn, and upon her return home, finding it badly done, she threw a four-legged stool at the child, and struck her on the right temple of which the child soon afterwards died. The jury found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner, when she threw it, did not intend to kill the deceased. She afterwards threw the body into the river, and told her husband that the child was lost. After argument in the King's Bench, (where several formal objections were taken to the special verdict,) the case on account of its difficulty, was referred to the consideration of all the judges, but no opinion was ever delivered, as some of the judges thought it a proper case to recommend a pardon. *Hazel's case*, 1 *East, P. C.* 236; 1 *Leach*, 368. Where the prisoner had given a pair of clogs to the deceased, a boy, to clean, and finding them not cleaned, struck him with one of them, of which blow the boy died; this was held to be only manslaughter, because the prisoner could not, from the size of the instrument made use of, have had any intention to take away the boy's life. *Turner's case, Ld. Raym.* 144, 1499. The prisoner, a butcher, seeing some of his sheep getting through the hurdles of their pen, ran towards the boy who was tending them, and taking up a stake that was on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which he soon afterwards died. Nares, J., said to the jury, you will consider whether the stake, which was lying on the ground, was the first thing the prisoner saw in the heat of his passion, is or is not, under such circumstances, and in such a situation, an improper instrument for the purposes of correction. For the

using a weapon from which death is likely to ensue, imports a mischievous disposition, and the law implies that a degree of malice attending the act, which, if death actually happen, will be murder. Therefore, if you should think the stake an improper instrument, you will further consider whether it was used with an intent to kill. If you think it was, you must find the prisoner guilty of murder. But, on the contrary, if you are persuaded that it was not done with an intent to kill, the crime will then amount at most to manslaughter. *Wigg's case*, 1 *Leach*, 387, (*n*). A. finding a trespasser on his land, in the first transport of his passion, he beats him, and kills him; this has been held manslaughter. 1 *Hale, P. C.* 473. But it must be understood, says Mr. Justice Foster, that he beat him not with a mischievous intention, but merely to chastise and deter him. For if he had knocked his brains out with a bill or hedge-stake, or given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder. *Foster*, 291.

The prisoner was indicted for manslaughter. It appeared that he was in the habit of going to a cooper's shop for chips, and was told by the cooper's apprentice that he must not come again. In the course of the same day he came again, and was stopped by the apprentice, upon which he immediately went off, and in passing a work-bench took up a *whittle* (a sharp pointed knife with a long handle) and threw it at the apprentice, whose body it entered, and killed him. Hullock, B., said to the jury, if without adequate provocation a person strikes another with a weapen likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice, from the circumstances, and he is guilty of murder. The jury found the prisoner guilty, and Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge. *Langstaff's case*, 1 *Lewin, C. C.* 162.

Proof of malice—provocation must be recent.] In order to rebut the evidence of malice, it must appear that the provocation was recent; for in every case of homicide, however great the provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. *Foster* 296. With respect to the interval of time allowed for passion to subside, it has been observed, that it is much easier to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. It must be remembered, that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled, any time before the mortal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, it being attributable to malice and revenge, rather than to human frailty. 1 *East, P. C.* 252; 2 *Lord Raym.* 1496. The following are stated as general circumstances amounting to evidence of malice, in disproof of the party's having acted under the influence of passion only. If, between the provocation received and the stroke given, the party giving the stroke fall into other discourse or diversions, and continue so engaged a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, or

subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of his provocation; again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it, for that shows deliberation which is inconsistent with the excuse of sudden passion, and is the strongest evidence of malice; in these cases the killing will amount to murder. It may further be observed, in respect to time, that in proportion to the elapse between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument or the manner of it. The more length of time intervening between the injury and the retaliation adds very much to the presumption of malice in law, and is in some cases evidence in itself of deliberation. 1 *East*, *P. C.* 252. A leading case on this subject is that of Major Oneby, who was indicted for the murder of a Mr. Gower. A special verdict was found, which stated that the prisoner, being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half-crowns, whereupon the deceased in a jocular manner, laid down three-half-pence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half-crowns and lost them to him; immediately after which, the prisoner in an angry manner turned to the deceased and said, it was an impertinent thing to set half-pence, and he was an impertinent puppy for so doing; to which the deceased answered, whoever called him so was a rascal. Upon this the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him. The deceased immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose to fetch their swords, which hung in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company. The deceased then threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over," and at the same time offered his hand to the prisoner, who replied, "No, damn you, I will have your blood!" The reckoning being paid, all the company, except the prisoner, went out of the room to go home, but he called to the deceased, "Young man, come back, I have something to say to you," on which the deceased came back. The door was immediately closed, and the rest of the company excluded, but they heard a clashing of swords, and the deceased was found to have received a mortal wound. It was also found that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight, and the deceased being asked on his death-bed whether he received his wound in a manner among swordsmen called fair, answered, "I think I did." It was further found, that from the throwing of the bottle there was no reconciliation between the prisoner and the deceased. Upon these facts, all the judges were of opinion that the prisoner was guilty of murder, he having acted upon malice and deliberation, and not from sudden passion. *Oneby's case*, 2 *Str.* 766; 2 *Ld. Raym.* 1489. It must, I think, says Mr. East, be taken, upon the facts found in the verdict, and the argument of the chief justice, that after the door had been shut the parties were upon an equal footing, in point of preparation, before the fight began in which the

mortal wound was given. The main point then upon which the judgment turned, and so declared to be, was *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances the court were of opinion that the prisoner had had *reasonable time for cooling*, after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, *he would have his blood!* And again, the prisoner remaining in the room after the rest of the company had retired, and calling back the deceased by the contemptuous appellation of *young man*, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness, as precluded the presumption of passion being continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances, for it must have been implied, according to *Mawgridge's case*, (*Kel.* 128,) that he acted upon malice, having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of the deceased, made a deadly assault upon him. 1 *East P. C.* 254. The following case will illustrate the doctrine in question. The deceased was requested by his mother to turn the prisoner out of her house, which, after a short struggle, he effected, and in doing so, gave him a kick. On the prisoner leaving the house, he said to the deceased, "he would make him remember it," and instantly went up the street to his own lodging, which was distant from two to three hundred yards, where he was heard to go to his bed-room, and, through an adjoining kitchen, to a pantry, and thence to return hastily back again by the same way, to the street. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate. He had also three similar knives there, which he used in his trade of a butcher. About five minutes after the prisoner had left the deceased, the latter followed him for the purpose of giving him his hat, which he had left behind him, and they met about ten yards distant from the prisoner's lodgings. They stopped for a short time, and were heard talking together, but without any words of anger, by two persons who went by them, the deceased desiring the prisoner not to come down to his mother's again that night, and the prisoner insisting that he would. After they had walked on together for about fifteen yards, in the direction of the mother's house, the deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with a knife, or some sharp instrument, in two places, giving him a sharp wound on the shoulder, and a mortal wound in the belly. As soon as the prisoner had stabbed the deceased a second time, he said he had served him right, and instantly ran back to his lodging, and was heard, as before, to pass hastily through his bed-room and kitchen to the pantry, and thence back to the bed-room, where he went to bed. No knife was found upon him, and the several knives appeared the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the principal question for their consideration would be whether the mortal wound was given by the prisoner, while smarting under a provocation so recent and so strong, that he might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only: or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful

murder. That, in determining this question, the most favourable circumstance for the prisoner, was the shortness of time which elapsed between the original quarrel and the stabbing of the deceased; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound, was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say, whether the prisoner had shown thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion. The jury found the prisoner guilty of murder. *Hayward's case*, 6 *C. & P.* 157.

"If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things: first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion, arising from that provocation." *Per Parke, B.*, *Thomas's case*, 7 *C & P.* 817. In the same case the learned baron held, that if from the circumstances it appeared that the party, before any provocation given, intended to use a deadly weapon towards any one who might assault him, this would show that a fatal blow given afterwards to a person who struck him ought not to be attributed to the provocation, and the crime would therefore be murder. The prisoner was charged with the wilful murder of his son, John Kirkham, by stabbing him with a knife. A witness, named Chorlton, stated, "I was alarmed on the morning of Saturday, the 21th of June, at about four o'clock, and got up. On entering the prisoner's house, I saw the prisoner and his son on the floor; the son was uppermost, and they were wrestling together. I asked the deceased to get up; he did so, and went to the door. The prisoner then took up a coal-pick (a sort of small pick-axe) which must have been in the room, as he did not leave the room to get it. The prisoner threw the coal-pick at his son, which struck him on the back. The deceased said it hurt him, and the prisoner said he would have his revenge. The coal-pick flew into the street, and the deceased fetched it, and tossed it into the house, but not at the prisoner. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table, and jobbed the deceased with it on the left side. The deceased said, 'Father, you have killed me!' and retreated a few paces into the street, reeling as he went. I told the prisoner he had stabbed his son. He said, 'Joe, I will have my revenge.' The deceased came into the house again, and the prisoner stabbed the deceased again in the left side. The deceased died at seven o'clock the same morning. I think from my first going to the house till the fatal blow was struck was about twenty minutes."

A female, named Wagstaffe, was also examined, who said, "I saw the prisoner on the Monday before the death of his son. He came to my house drunk, and said he had lost his wife, and that he and his wife had been quarrelling the Saturday before, and if his son John came over the door-sill again he would be his butcher. He said his son took his mother's part. I introduced the name of the deceased by saying that if he beat his wife his son would take her part, and it

was upon that he used the expressions as to the deceased. On the evening before the deceased was killed I saw the prisoner again; he was rather tipsy; I was talking to his wife, who went away when he came up. He said, if his wife talked to me he would hit her, and he added, 'To-morrow is the day of execution, and that day I shall finish their hash.' I told him if he was sober he would not say so; to this he made no reply. I begged him to be quiet, and he went into his own house." In her cross-examination this witness stated that the threat, "I will be your butcher," is a common threat in that part of the country. Coleridge, J., told the jury, after observing on the declarations of the prisoner spoken to by the last witness, which he did not think entitled to much consideration: "Then I will suppose that all was purely unpremeditated till Chorlton came, and then the case will stand thus:—the father and son have a quarrel; the son gets the father down, the son has the best of it, and the father has received considerable provocation: and if, when he got up, and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done; and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting under its sting, and the blood remained hot; but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because though the law condescends to human frailty, it will not indulge human ferocity." The prisoner was found guilty of manslaughter. *Kirkham's case*, 8 *C. & P.* 115. The prisoner, who was charged with murder, was a private of the Coldstream Guards, and was discharged on the 11th October, and on the evening of that day went to the Three Horse Shoes, at Hampstead, in company with a person named Burkill and his brother, Richard Smith. There were two more soldiers in the public-house, and the deceased, James Chaplin, was sitting with them. A dispute arose about paying the reckoning, and a fight took place between the prisoner and a man named Burrows. In the scuffle the deceased jumped over the table and struck the prisoner. The deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out. The deceased remained about a quarter of an hour after the prisoner, and then left. The prisoner and the deceased were both in liquor. The deceased tried to get out directly after the prisoner and his brother left, but was detained by the persons in the room. As soon as they let him go, he jumped over the table, and went out of the house, saying as he went, that if he caught them he would serve them out. The deceased was a person who boasted of his powers as a fighter. The deceased followed the prisoner and his brother into a mews not far from the public-house where they had been drinking; and a witness who had lived near stated, that he heard a noise and went to the door of his house, and then heard a bayonet fall on the ground, and on going out into Church-lane, heard a person, named Croft, crying out, "Police! police! a man is stabbed!" and on going up, found the deceased lying on the ground wounded. Croft stated, that he was in Field-

place, near Church-lane, and heard voices, which induced him to run towards a bar there, and when within a yard of the bar, he heard a blow like the blow of a fist; this was followed by other blows. After the blows, he heard a voice say, "Take that," and in half a minute, to the best of his judgment, the same voice said, "He has stabbed me!" The wounded man then ran towards him, and he discovered it to be the deceased. He said, "I am stabbed," three times, and soon after fell on the ground; the prisoner was soon after taken into custody, and was then bleeding at the nose. The prisoner had not any side-arms; but his brother, who was with him, had a bayonet. For the defence, the prisoner's brother was called as a witness, and stated, when they had got about twenty yards through the bar mentioned in Croft's evidence, he heard somebody say something, but did not take notice of it, and deceased came up, and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner, who had gone on; there was a great struggle between them, and very shortly after the deceased cried out, "I am stabbed! I am stabbed!" A surgeon was also called, who proved that there were wounds on the prisoner's hands such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., in summing up to the jury, said, "Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder; but if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? if he did then it will be manslaughter. But there is another question. Did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape in such case, if he retreated as far as he could, he will be justified." The prisoner was found guilty of manslaughter, but strongly recommended to mercy. *George Smith's case*, 8 *C. & P.* 160.

Proof of malice—provocation—express malice.] As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there is proof of *express malice* at the time of the act committed, the provocation will not reduce the offence from murder to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 *Russ. by Grea.* 520. This rule is illustrated by the following case. Richard Mason was indicted and convicted for the wilful murder of William Mason, his brother; but execution was respited to take the opinion of the judges, upon a doubt, whether, upon the circumstances given in evidence, the offence amounted to murder or manslaughter. The prisoner, with the deceased and some neighbours, were drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to push each other about the room. They then wrestled one fall; and soon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either side, till the prisoner, in the cudgel

play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry, and throwing away his cudgel, closed in with the prisoner, and they fought a short time in good earnest; but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me, if I do not fetch something, and stick him;" and being reproved for such expressions, he answered, "I'll be damned to all eternity, if I do not fetch something, and run him through the body." The deceased and the remainder of the company continued in the room where the affray happened: and in about half an hour the prisoner returned having in the mean time changed a slight for a thicker coat. The door of the room being open to the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right; looking in upon the company, but not speaking a word. The deceased, seeing him in that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you may fall on me, and beat me." The deceased assured him he would not, and added, "Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you will keep off your fists." Upon these words the deceased got up, and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck-sword, crying, "Damn you, stand off, or I'll stab you!" and immediately, without giving the deceased time to stand off, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little, and the prisoner, shortening the sword in his hand, leaped forward towards the deceased, and stabbed him to the heart, and he instantly died. The judges, at a conference, unanimously agreed, "that there are in this case so many circumstances of deliberate malice and deep revenge on the prisoner's part, that his offence cannot be less than wilful murder." *Mason's case, Foster*, 132; 1 *East, P. C.* 239.

Proof of malice—cases of mutual combat.] The rules with regard to the proof of malice in cases of mutual combat, are not in all respects the same with those which have been already stated with regard to cases of provocation in general, and as the former are of very frequent occurrence it may be convenient to consider them under one head.

In this class of cases the degree or species of provocation does not enter so deeply into the merits of the question, as in those which have been just noticed, and in the former it has been held that where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side, if death ensue, this amounts to manslaughter only. Nor is it material what the cause be, whether real or imagined, or who draws or strikes first, provided the occasion be sudden, and not urged as a cloak for pre-existing malice. 1 *East, P. C.* 241. Many, says Lord Hale, who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation, as to lessen the crime into manslaughter, were yet of this opinion, that if A. gives indecent language to B.,

and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and B. kills A., this is manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and though B. gave the first stroke, and after a blow received from A., B. gives him a mortal stroke, this is but manslaughter; according to the proverb, the *second blow makes the affray*; and this, adds Lord Hale, was the opinion of myself and others. 1 *Hale*, *P. C.* 456; *Foster*, 295. But if B. had drawn his sword and made a pass at A., *his sword then undrawn*, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed, this would have been murder; for B. by making his pass, *his adversary's sword undrawn*, showed that he sought his blood, and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. But if B. had first drawn and forborne till his adversary had drawn too, it had been no more than manslaughter. *Foster*, 295; 1 *East*, *P. C.* 242.

With regard to the use of deadly weapons in a case of mutual combat, the rule was laid down by Mr. Justice Bayley, in the following case. The prisoner and Levy quarrelled, and went out to fight. After two rounds, which occupied little more than two minutes. Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner, who had a clasp knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning, or if, before they began to fight, he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder. *Anderson's case*, 1 *Russ. by Grea.* 531. Another later case exhibited nearly similar circumstances. The prisoner returning home was overtaken by the prosecutor. They were both intoxicated, and a quarrel ensuing, the prosecutor struck the prisoner a blow. They fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued and overtook him. On this the prisoner, who had taken out his knife, gave the prosecutor a cut across the abdomen. The prisoner being indicted for cutting the prosecutor with intent to murder him, Park, J., left it to the jury whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so gain an advantage in the conflict; for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, he was of opinion that if death had ensued, the crime of the prisoner would have been murder; or whether the prisoner *bonâ fide* ran away from the prosecutor with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; and in the latter case, if the prosecutor had been killed, it would have been manslaughter only. *Kessal's case*, 1 *C. & P.* 437. In the following case, the use of a deadly weapon during a fight was held to be no evidence of malice, the prisoner happening to have the knife in his hand at the commencement of the affray. William Snow was indicted for the murder of Thomas Palmer. The prisoner, who was a shoemaker, lived in the neighbourhood of the deceased. One evening the prisoner, who was much in liquor, passed accidentally by the house of the deceased's mother, near which the deceased was at work. He had a quarrel with him there, and after high words they were going

to fight, but were prevented by the mother, who hit the prisoner in the face and threw water over him. The prisoner went into his house, but came out in a few minutes, and set himself down upon a bench before his gate, with a shoemaker's knife in his hand, paring a shoe. The deceased, on finishing his work, returned home by the prisoner's house, and called out to him as he passed, "Are not you an aggravating rascal?" The prisoner replied, "What will you be when you are got from your master's feet?" on which the deceased took the prisoner by the collar, and dragging him off the bench, they both rolled into the cart-way. While they were struggling and fighting, the prisoner underneath the deceased, the latter cried out, "You rogue, what do you do with that knife in your hand?" and caught at his arm to secure it; but the prisoner kept his hand striking about, and held the deceased so hard with his other hand that he could not get away. The deceased, however, at length made an effort to disengage himself, and during the struggle, received the mortal wound in his left breast, having before received two slight wounds. The jury found the prisoner guilty of murder; but judgment was respited to take the opinion of the judges, who (in the absence of De Grey, C. J.,) were unanimously of opinion that it was only manslaughter. They thought that there was not sufficient evidence that the prisoner lay in wait for the deceased with a malicious design to provoke him, and under that colour to revenge his former quarrel by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by provoked him neither by word nor by gesture. The deceased began first by ill language, and afterwards by collaring him and dragging him from his seat, and rolling him in the road. The knife was used openly, before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were both down; and though the prisoner was not justifiable in using such a weapon on such an occasion, yet, it being already in his hand, and the attack upon him very violent and sudden, they thought it only amounted to manslaughter, and he was recommended for a pardon. *Snow's case*, 1 *East*, *P. C.* 244, 245.

Not only will the premeditated use of deadly weapons, in cases of mutual combat, render the homicide murder, but the combat itself may be of such a nature as to make it murder if death ensue. The prisoner was indicted for manslaughter, and the evidence was, that he and the deceased were "fighting up and down," a brutal and savage practice in the north of England. Bayley, J., said to the jury, Fighting "up and down" is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of this description it is murder, and not manslaughter. The prisoner being convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment. *Thorpe's case*, 1 *Lewin*, *C. C.* 171; see *Murphy's case*, 6 *C. & P.* 103, *ante*, p. 703.

In order to bring the case within the rule relating to mutual combats, so as to lessen the crime to manslaughter, it must appear that no undue advantage was sought or taken on either side. *Foster*, 295. To save the party making the first assault upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be upon an equal footing, in point of defence at least, at the outset; and this is pecu-

liarly requisite where the attack is made with deadly or dangerous weapons. 1 *East, P. C.* 242. Where persons fight on fair terms, says Mr. Justice Bayley, "and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder. *Whiteley's case*, 1 *Lewin, C. C.* 173.

The lapse of time, also, which has taken place between the origin of the quarrel and the actual contest, is in these cases a subject of great consideration, as in the following instance. The prisoner was indicted for the wilful murder of William Harrington. It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public-house, on the night of the 27th of February, till about twelve o'clock; that about one they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist and gave him a black eye. The prisoner called for the police, and on a policeman coming, went away. He, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The prisoner's father proved that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellects, but not so much so as not to know right from wrong. Lord Tenterden, in summing up, said, "It is not very slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went any where for the knife. The father says that it was a knife he carried about with him, it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears, he might have gone a little way from the deceased, and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I

should think you hardly would), then you will find him guilty of murder." The jury found the prisoner guilty of manslaughter. *Lynch's case*, 5 *C. & P.* 324.

In cases of mutual combat, evidence is frequently given of old quarrels between the parties, for the purpose of showing that the person killing acted from malice towards the deceased, but it is not in every case of an old grudge that the jury will be justified in finding malice. Thus, where two persons who have formerly fought in malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge; *Hawk. P. C*, *b.* 1, *c.* 31, *s.* 30; unless it appear that the reconciliation was pretended only. 1 *Hale*, *P. C.* 452. If, says Lord Hale, A. sues B., or threatens to sue him, this alone is not sufficient evidence of malice prepense, though possibly they meet and fall out and fight, and one kills the other, if it happens upon sudden provocation; but this may by circumstances be heightened into malice prepense, as if A., without any other provocation, strikes B. upon account of that difference in law, or lies in wait to kill him, or comes with a resolution to strike or kill him. 1 *Hale*, *P. C.* 451.

Proof of malice—cases of mutual combat—duelling.] Deliberate duelling, if death ensues, is in the eye of the law murder; for duels are generally founded in deep revenge. And though a person should be drawn into a duel, not on a motive so criminal, but merely upon the punctilio of what the swordsmen falsely call honour, that will not excuse him. For he that deliberately seeks the blood of another, in a private quarrel, acts in defiance of all laws, human and divine, whatever his motive may be. But if upon a sudden quarrel the parties fight on the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them falls, it will be only manslaughter, because it may be presumed that the blood never cooled. It will however be otherwise, if they appoint to fight the next day, or even upon the same day, at such an interval, as that the passion might have subsided, or if from any circumstance attending the case, it may be reasonably concluded that their judgment had actually controlled the first transport of passion before they engaged. The same rule will hold, if after a quarrel they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling. *Foster*, 297. It seems agreed, says Hawkins, that wherever two persons in cool blood meet, and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, and that he had often declined to meet him, but was prevailed upon by his importunity, or that it was his intention only to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary, for since he deliberately engaged in an act highly unlawful he must at his peril abide the consequences. *Hawk. P. C. b.* 1, *c.* 31, *s.* 21. It is said by Lord Hale, that if A. and B. meet deliberately to fight, and A. strikes B., and pursues him so closely, that B. in safeguard of his own life kills A., this is murder in B., because their meeting was a compact, and an act of deliberation, and therefore all that follows thereupon is presumed to be done in pursuance thereof, and thus is *Dalton* (*cap.* 92, *p.* 241), to be understood. 1 *Hale*, *P. C.* 452. But yet, *quære*, adds Lord Hale, whether if B. had really and *bonâ fide* declined to fight, ran away as far as he could (suppose it half a mile), and offered to yield, yet A. refusing to decline it, had attempted his

death, and B. after all this kills A. in self defence, whether it excuses him from murder? But if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it is murder. *Ibid.* Blackstone has noticed this doubt, but has given no opinion upon the subject; 4 *Com.* 185; but Mr. East has argued at some length in support of the proposition, that such homicide will not amount to murder, on the ground that B., by retreating, expressly renounces the illegal combat, and gives reasonable grounds for inducing a belief that he no longer seeks to hurt his opponent, and that the right of self-defence ought not therefore to be withheld from him. 1 *East*, 285. But if B. does not retreat *voluntarily*, but is driven to retreat by A., in such case the killing would be murder. Thus it is said by Hawkins, that if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there, in his own defence, he is guilty of murder in respect of his first intent. *Hawk. P. C. b.* 1, *c.* 31, *s.* 26.

In cases of deliberate duelling, in which death ensues, not only is the principal who inflicts the wound guilty of murder, but also the second, and it has been doubted whether the second of the party killed is not also guilty of the same offence. For the latter position Lord Hale cites the book of 22 *Edw.* 3, *Coron.* 262, but he adds, that he thinks the law too much strained in that case, and that though a great misdemeanor, it is not murder. 1 *Hale, P. C.* 442. But see *Cuddy's case*, 1 *C. & K.* 210, where it was held by Williams, J., (Rolfe, B., being present) that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such duel may be convicted of murder, on an indictment charging him with being present aiding and abetting the person, by whose act the death of his principal was occasioned.

The prisoners were indicted for the murder of Charles Flower Mirfin, who was killed in a duel by a Mr. Elliott. Neither of the prisoners acted as a second on the occasion, but there was evidence to show that they and two other persons went to the ground in company with Mr. Elliott, and that they were present when the fatal shot was fired. Vaughan, B., told the jury, "When upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the seconds also are equally guilty. The question then is, did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest?" After observing that neither prisoner had acted as a second, the learned judge continued. "If, however, either of them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do any thing, yet if he was present and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by this indictment." The prisoners were found guilty. *Young's case*, 8 *C. & P.* 644.

Proof of malice—peace officers and others killed in performing their duty—what persons are within the rule.] The protection is not confined to the person of the officer only. Every one lending his assistance to an officer of the peace, for the keeping of the peace, whether

commanded to do so or not, is under the same protection as the officer. *Foster*, 309; 1 *Hale, P. C.* 463.

Nor is the protection confined to the ordinary ministers of justice or their assistants. It extends, with some limitations, to private persons interposing to prevent mischief in case of an affray, or endeavouring to apprehend felons, or persons who have given a dangerous wound, and bring them to justice. For those persons are discharging a duty required of them by law. *Foster*, 309. But in the case of private persons endeavouring to bring felons to justice, this caution must be observed, *viz.* that a felony has been actually committed, for if not, no suspicion, however well founded, will bring the person so interposing within the protection of the law; and supposing a felony to have been actually committed, and the party interposing to arrest a wrong person, he will not be entitled to protection. *Foster*, 318.

There is a distinction between this case, and that of a peace officer, who has a warrant against a particular person by that name, though that person may happen to be innocent of the offence with which he is charged. If A., being a peace officer, has a warrant from a proper magistrate for apprehending B. *by name*, upon a charge of felony, or if B. stands indicted for felony, or if the hue and cry be levied against B. *by name*, in these cases, if B., though innocent, flies, or turns and resists, and in the struggle or pursuit is killed by A. or any person joining in the hue and cry, the person so killing will be indemnified. And on the other hand, if A. or any other person joining in the hue and cry is killed by B., or any of his accomplices joining in that outrage, it will be murder. For A. and those joining with him were in this instance in the discharge of a duty the law requires from them, and subject to punishment, in case of a wilful neglect of it. *Foster*, 318.

Proof of malice—peace officers killed, or killing others in performance of their duty—their authority.] It will be convenient to consider the evidence relating to the conduct of peace officers in the execution of their duty, under the following heads:—1, their authority or warrant; 2, what notice of their authority is required; 3, the mode of executing their authority; and 4, the mode, where an officer is killed, in which that killing was effected.

With regard to the *authority* of a peace officer, and those assisting him, they are justified in apprehending, without any warrant, all persons who have committed a felony, or have been indicted for felony, and if in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. 1 *East, P. C.* 298, 300. So a peace officer may justify an arrest on a charge of felony, on reasonable suspicion, although it should afterwards appear that no felony has been committed. *Samuel* v. *Payne, Dougl.* 359; 1 *East, P. C.* 301. The constable, it is observed by Lord Hale, cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till he be apprehended, which he thinks a sufficient reason for justifying him in killing the party accused, if he fly from the arrest, and cannot otherwise be taken, however innocent he may afterwards appear to have been. 2 *Hale, P. C.* 84, 89, 93; 1 *East, P. C.* 301. All that can in reason be required of the peace officer is, that he should inform himself, as well as he can, of the circumstances, and that the relation of the party who gave him information should appear credible. 1 *East, P. C.* 302. But in order to justify a peace

officer in making an arrest, upon suspicion of felony, on the charge of another, it must appear that the party arrested was charged with *felony*. The prisoner having quarrelled with his master about wages, the latter threatened to send for a constable. The prisoner went up stairs for his tools, and said no constable should stop him, and coming down he drew from his sleeve a naked knife, saying he would do for the first bloody constable that offered to stop him;—that he was ready to die, and would have a life before he lost his own, and making a flourishing motion with his knife, he put it in his sleeve again, and left the shop. The master then applied to a constable, but made no charge, only saying he suspected the prisoner had tools of his, and was leaving his work undone. The constable told him he would take him, if the master would give him in charge, upon which the master took the constable to the place in which the prisoner was (a privy), and said, "That is the man, I give you in charge of him." The constable then said to the prisoner, "My good fellow, your master gives you in charge to me, you must go with me." The prisoner, without speaking, stabbed the constable with a knife under the left breast, and attempted to make three other blows. Being indicted for maliciously stabbing the constable, and convicted, a case was reserved for the opinion of the judges, the majority of whom held, that as the actual arrest would have been illegal, an attempt to make it, when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only, and that there the conviction was wrong. Holroyd and Burrough, JJ., thought otherwise. *Thomson's case*, 1 *Moo. C. C.* 80. So in the following case (which was an indictment under the 43 Geo. 3, for cutting the prosecutor, who had assisted the constable), the charge upon which the constable and the prosecutor acted, was held to be not sufficient to justify the arrest. A person travelling on the highway told the constable that a man coming on the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take him before a magistrate for so misusing him, on which the constable meeting the prisoner passing along the highway, ordered him to stop, for insulting a man on the road, and told him he was his prisoner, ordering the prosecutor to assist him. The prisoner being in custody, attempted to escape, but being pursued by the prosecutor, gave him the cut in the face, for which he was indicted and convicted. On a case reserved, the judges were of opinion that the original arrest was illegal, and that the recaption would also have been illegal; that the case would not have been murder if death had ensued, and that the prisoner was consequently entitled to an acquittal. *Curvan's case*, 1 *Moo. C. C.* 132; see also *Dadson's case*, 2 *Den. C. C. R.* 35, *post*. But in order to justify the officer, the charge need not contain the same accurate description of the offence, as would be required in an indictment. Thus, where the prisoner was delivered into the custody of a constable, who was told that it was because he had a forged note in his possession, and the prisoner shot at, and wounded, the constable, and was thereupon indicted for that offence; it was held, on a reference to the judges, that the conviction was right. They were of opinion, that though the charge on which the prisoner was taken into custody, *viz.* the having a forged note in his possession, without more, was defective, still that defect was immaterial; that it was not necessary that the charge should contain the same

accurate description of the offence as an indictment, and that it must be considered as imputing to the prisoner a *guilty* possession. *Ford's case, Russ. & Ry.* 329.

At common law, both peace officers and private persons are justified, without a warrant, in apprehending and detaining, until they can be carried before a magistrate, all persons found attempting to commit a felony. *Hunt's case*, 1 *Moo. C. C.* 93.

So at common law, either a constable or a private person may interpose, without warrant, to prevent a breach of the peace, and if he be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder, and cannot excuse himself by alleging that what he did was in a sudden affray, in the heat of blood; for he who carries his resentments so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him, than by doing their duty, and endeavouring to restrain him from breaking through his, shows such an obstinate contempt of the law, that he is no more to be favoured than if he had acted in cool blood. *Hawk. P. C.* b. 1, c. 31, s. 48. See *Derecourt* v. *Corbishley*, 1 *Jur. N. S.* 870, *Q. B.*

But whether a constable or other peace officer is warranted in arresting a person upon a charge by another, of a mere breach of the peace, after the affray is ended, without a special warrant from a magistrate, is a point which has occasioned some doubt. According to some authorities, the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice, to find security for his appearance. 2 *Hale, P. C.* 90; *Hancock* v. *Sandham*, *Williams* v. *Dempsey*, 1 *East, P. C.* 306 (*n*). But the better opinion is said to be the other way. 1 *East, P. C.* 305; *Hawk.* b. 2, c. 12, s. 20; 1 *Russ. by Grea.* 601. See *Timothy* v. *Simpson*, 1 *C., M. & R.* 757. In *Walker's case*, 1 *Dears. C. C. R.* 358; *S. C.* 23 *L. J. M. C.* 123, the prisoner had assaulted a police constable who went away, and after two hours time returned and took him into custody; the court held, that this was an unlawful apprehension. Pollock, C. B., said, "The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit. The interference of the officer, therefore, was not for the purpose of preventing an affray, or of arresting a person whom he had seen recently committing an assault. The apprehension was so disconnected from the offence as to render it unlawful." It seems, however, that if one person threatens to kill another, who complains to a constable, the latter may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him before a justice of the peace. 2 *Hale, P. C.* 88. This power is grounded on the duty of the officer, to prevent a probable felony, and must be governed by the same rules which apply to that case. 1 *East, P. C.* 306.

According to Lord Hale, a peace officer may arrest *night-walkers*, or persons unduly armed, who will not yield themselves, and if they fly or resist, and the officer, in endeavouring to arrest them, kills them, it is not felony, though the parties be innocent. 3 *Hale, P. C.* 85, 97. But unless there were a reasonable suspicion of felony in such a case, it may be a matter of doubt at this day, says Mr. East, whether so great a degree of severity would be either justifiable or necessary, especially in case of mere flight. 1 *East, P. C.* 303. In

one case it was held, that the apprehension of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person arrested was innocent, and there were no reasonable grounds to mislead the officer. *Tooley's case*, 2 *Lord Raym.* 1301. And Lord Holt is reported to have said, that constables had made a practice of taking up people only for walking the streets, but he knew not whence they had such an authority. 2 *Hale, P. C.* 89 (*n*). In a late case of an action for false imprisonment, it appeared that the plaintiff was returning home late from a party, when a constable seized him as a disorderly person, and carried him before the captain of the watch (the defendant) who, upon the information of the constable, sent him to the house of Correction till the following morning. The defendant justified under a local act, which gave power to apprehend all *night-walkers*, malefactors, and suspicious persons. But Bayley, J., said this was no defence to the action; that by *night-walkers* was meant such persons as are in the habit of being out at night for some wicked purpose, and that there was no evidence to show that the plaintiff was a malefactor or suspicious person. *Watson* v. *Carr*, 1 *Lewin, C. C.* 6.

It is said in one case that watchmen and beadles have power at common law to arrest and detain in prison, for examination, persons walking in the streets at night, *where there is reasonable ground to suspect a felony*, although there is no proof of a felony having been committed. *Lawrence* v. *Hedger*, 3 *Taunt.* 14. This case, however, does not appear to extend beyond the rule already laid down, that every peace officer has authority, upon a reasonable suspicion of felony, to arrest a party, whether by day or night. It is said by Hawkins, that it is held by some that any *private person* may lawfully arrest a suspicious night-walker, and detain him till it be made to appear that he is a person of good reputation; and also that it has been adjudged that any one may apprehend a *common notorious cheat*, going about the country with false dice, and being actually caught playing with them, in order to have him brought before a justice of the peace. *Hawk. P. C.* b. 2, c. 13, s. 20; and see the 5 Geo. 4, c. 13, s. 6, stated, *post*, p. 735.

As to the authority of constables and other officers to interfere with persons in inns and public-houses, see *R.* v. *Mabel*, 9 *C. & P.* 474.

An officer is not justified in killing, to prevent an escape, where the party is in custody on a charge of misdemeanor. The prisoner, an excise officer, had apprehended a smuggler, who, after his capture, assaulted the officer, and beat him severely, when the former fired a pistol at his legs, and warned him to keep off. The smuggler, however, rushed forwards, when the prisoner again fired at and killed him. Holroyd, J., said to the jury, an officer must not kill for an *escape* when the party is in custody for a misdemeanor; but if the prisoner had reasonable grounds for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of using such weapon by the previous violence he had suffered, then he was justified. *Foster's case*, 1 *Lewin, C. C.* 187.

By various statutes, peace-officers and others are authorised to arrest certain offenders without warrants. The most important of these acts are those of the 7 & 8 Geo. 4, c. 29, and c. 30. By the former (s. 63) it is enacted, "that any person found committing any offence punishable either by indictment or upon summary conviction

by virtue of this act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or by any person authorised by him, and forthwith taken before some neighbouring justice of the peace." See *R.* v. *Phelps*, *Carr. & M.* 180; *S. C.* 2 *Moo. C. C.* 240. The 7 & 8 Geo. 4, c. 30, s. 28, and the 14 & 15 Vict. c. 19, s. 10, contain similar provisions applicable to offences committed against those acts respectively.

By the metropolitan police act, 10 Geo. 4, c. 44, s. 7, it is enacted, "that it shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find, between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail in the manner thereinafter mentioned."

By the metropolitan police act, the 2 & 3 Vict. c. 47, s. 65, "it shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person, who within the limits of the metropolitan police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed *although not within the view of such constable*, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender." See also ss. 54, 64, and 66 of the same statute.

So by the rural police act, 10 & 11 Vict. c. 89, s. 15: "Any person found committing any offence punishable either upon indictment, or as a misdemeanor upon summary conviction, by virtue of this or the special act, may be taken into custody, without a warrant, by any of the said constables, or may be apprehended by the owner of the property on, or with respect to which, the offence is committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice to be examined and dealt with according to law: provided always that no person arrested under the powers of this or the special act shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost."

The 14 & 15 Vict. c. 19, s. 11, enacts as follows: "And whereas doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night: for remedy thereof be it enacted, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed,

as soon as conveniently may be, before a justice of the peace, to be dealt with according to law."

Special constables, appointed under the 1 & 2 Wm. 4, c. 41, continue to retain their authority till they have notice under s. 9 of the determination of their services, although such notice may not be given for many years. *Thomas's case*, 1 *Russ. by Grea.* 145 (*n*); *R.* v. *Porter*, 9 *C. & P.* 778.

Under the 10 Geo. 4, c. 44, s. 7, it has been ruled that a police constable is not justified in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because that other is known as a reputed thief. *Stoken* v. *Carter*, 4 *C. & P.* 477.

Whether persons in his Majesty's navy, acting in the impressment of seamen, are to be held to enjoy, in the execution of their duty, the same privilege as a peace officer acting by virtue of a warrant, does not seem to be well settled. It is clear, however, that in order to justify the act there must be a warrant, and that it must be executed by a proper officer. It is, however, laid down by Mr. East, that if there be a proper officer with a legal warrant, to impress, and the party endeavoured to be taken, being a fit object for that service, refuse to submit, and resist and kill the officer or any of his assistants, they doing no more than is necessary to impress the mariner, it will be murder. 1 *East, P. C.* 308. On the other hand, if the party attempted to be pressed be killed in such a struggle, it seems justifiable, provided the resistance could not be otherwise overcome; and the officer need not give way, but may freely repel force by force. *Id.* The following is one of the few cases to be found on this subject, and it can scarcely be said to recognise any principle with regard to the practice of impressment. An officer in the impress service put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects for the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her with a musket loaded with ball, *for the purpose of hitting the halyards and bringing the boat to*, which was found to be the usual way, one of which shots unfortunately killed Collyer. The court said it was impossible for it to be more than manslaughter. This, it may be presumed, was on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt was intended, it was manslaughter; and the defendant was burned in the hand. *Phillip's case, Cowper*, 832; 1 *East, P. C.* 308. The following cases only establish the position, that the impressment of persons without a warrant, is an illegal proceeding, and that the parties concerned do not enjoy the protection afforded to ministers of the law in the execution of their duty. The lieutenant of a press gang, to whom the execution of a warrant was properly deputed, remained in King Road in the port of Bristol, while his boat's crew went some leagues down the channel by his directions to press seamen. It was held that this impressment was illegal, and one of the press gang being killed, in the furtherance of that service, by a mariner, in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only manslaughter, though no personal violence had been offered by the press gang. *Broadfoot's case, Foster*, 154. So where the mate

of a ship and a party of sailors, without the captain (who had the warrant) or the lieutenant who was deputed to execute it, impressed a man, and on his resisting, the prisoner, one of the party, struck him a violent blow with a large stick, of which he died some days afterwards, it was adjudged murder. *Dixon's case*, 1 *East, P. C.* 313. In this case the party attempted to be impressed was not a mariner, and the attempt to impress him was therefore illegal on that ground, as upon the ground that neither the captain nor lieutenant was present. 1 *East, P. C.* 313. A press warrant had been directed to Lieutenant Wm. Palmer, enjoining all mayors, &c. to assist him and *those employed by him* in the execution thereof. Palmer gave verbal orders to the prisoners and several others to impress certain seafaring men, but the delegation was held to be clearly bad, and the execution of the warrant by the prisoners, Palmer not being there, to be illegal, though it was proved to be the constant custom of the navy to delegate the authority in this manner. *Borthwick's case*, 1 *Dougl.* 267; 1 *East, P. C.* 313.

A sailor in the king's navy, on duty as a sentinel, has no authority to fire upon persons approaching the ship against orders. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officers on deck allowed them to approach, and he received a musket, three blank cartridges, and three balls. Some boats pressing forwards, he called upon them repeatedly to stop; but one of them persisted, and came close under the ship. He then fired at a man who was in the boat and killed him. It was put to the jury whether he did not fire under the mistaken impression that it was his duty, and they found that he did. But on a case reserved, the judges resolved unanimously, that it was, nevertheless, murder. They thought it, however, a proper case for pardon; and further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. *Thomas's case*, 1 *Russ. by Grea.* 614.

A question sometimes arises, whether peace officers are in the performance of their duty, of conflicting authority, namely, whether they are to be subjected to the interference of other peace officers, on a charge or supposition of their having themselves been guilty of an offence in the execution of their duty. A case of this kind is put by Lord Hale. A. and B. being constables of the vill of C., and a riot happening between several persons, A. joined one party, and commanded the adverse party to keep the peace, and B. joined the other party, and in like manner commanded the adverse party to keep the peace. The assistants and party of A. in the tumult killed B. This, adds Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and one had as much authority as the other. 1 *Hale, P. C.* 460. It is remarked upon this passage, by Mr. East, that perhaps it would have been better expressed to have said, that inasmuch as they acted not with a view so much to keep the peace as in the nature of partisans to the different parties, they acted altogether out of the scope of their character as peace officers, and without any authority whatever. For if one having a competent authority, issue a lawful command, it is not in the power of any other, having an equal authority, to issue a command contrary to the first, for that would be to legalise confusion and disorder. 1 *East, P. C.* 304. And this doctrine seems to be

supported by another passage from Lord Hale, who says, that if the sheriff have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constables of the vill to assist him and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter, but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ. 1 *Hale, P. C.* 460. The sheriff's officers having apprehended a man by virtue of a writ, a mob attempted to rescue him. One of the bailiffs being assaulted, struck one of the assailants, a woman, and for some time it was thought he had killed her; whereupon the constable was sent for and charged with the custody of the bailiff. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence offered to them, notwithstanding which, he proceeded to take them into custody on the charge of murder. The woman having recovered, they were discharged next morning. The constable being indicted for the assault, Heath, J., was of opinion that he and his assistants were guilty of an assault, and a verdict was found accordingly. *Anon.* 1 *East, P. C.* 305.

A peace officer is to be considered as acting strictly in discharge of his duty, not only while executing the process entrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty. He is under the protection of the law, *eundo, morando, et redeundo.* And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will amount to murder. *Foster*, 308; 1 *Hale, P. C.* 463. Upon the same principle, if he meets with opposition by the way, and is killed before he comes to the place (such opposition being intended to prevent his performing his duty, a fact to be collected from the evidence), it will also amount to murder. *Foster*, 309.

The authority of a constable or other peace officer ceases with the limits of his district, and if he attempts to execute process out of the jurisdiction of the court or magistrate by whose orders he acts, and is killed, it is only manslaughter, as in the case of void process. 1 *Hale, P. C.* 458; 1 *East, P. C.* 314. So where a bailiff attempted to execute a writ without a *non omittas* clause, within an exclusive liberty, Holroyd, J., held him a trespasser, and the defendant who had wounded him in resisting, and who was indicted for maliciously cutting, with intent, &c. was acquitted. *Mead's case*, 2 *Stark. N. P. C.* 205.

But if the warrant be directed to a particular constable by name, and it is executed by him within the jurisdiction of the court or magistrate issuing the same, although it be out of the constable's vill, that is sufficient. 1 *East, P. C.* 314; *Hawk. P. C. b.* 2, *c.* 13, *s.* 27. By the 5 Geo. 4, c. 18, s. 6, reciting, that warrants addressed to constables, &c., of parishes, &c., in their character of and as constables, &c., of such respective parishes, &c., cannot be lawfully executed by them out of the precincts thereof respectively, it is enacted, "that it shall be lawful to and for each and every constable, and to and for each and every headborough, tithing-man, borseholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, hamlet, township or place, situate, lying, or being within the jurisdiction for which such justice or justices, magistrate or magistrates,

shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner, as if such warrant or warrants had been addressed to such constable, headborough, tithing-man, borseholder, or other peace officer, specially, by his name or names, notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place, for which he shall be constable, headborough, tithing-man, or borseholder, or other peace officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed." See 11 & 12 Vict. c. 42.

In general, where it becomes necessary, in order to show the character of the offence, to prove that the deceased, or the prosecutor, or other person was a constable, it will be sufficient to prove that he acted in that character, which will be *primâ facie* evidence of his regular appointment, without its production. *Vide ante*, pp. 6, 16.

Where it becomes necessary to show the warrant or writ upon which a constable or other officer has acted, it is sufficient to produce the warrant or writ itself, without proving the judgment or decree upon which it is founded. *Foster*, 311, 312; 1 *East*, *P. C.* 310. But it is not sufficient to prove the sheriff's warrant to the officer, without producing the writ of *capias*, *&c.*, upon which it issued. *Mead's case*, 2 *Stark. N. P. C.* 205; 2 *Stark. Ev.* 518, 2*d ed.* Where it is requisite to prove that the party was acting under an authority derived from the articles of war, a copy of the articles, printed by the King's printer, must be produced. In several instances, prisoners have been acquitted on a charge of murder for want of such evidence. 2 *Stark. Ev.* 519, 2*d ed.*

Proof of malice—peace officers killed or killing others in performance of their duty—their authority—regularity of process.] Where a peace officer, or other person, having the execution of process, cannot justify without a reliance on such process, it must appear that it is legal. But by this, it is only to be understood that the process, whether by writ or warrant, be not defective in the frame of it, and issue, in the ordinary course of justice, from a court or magistrate having jurisdiction in the case. Though there may have been error or irregularity in the proceedings previous to the issuing of the process, yet if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it; and therefore, if a *ca. sa.* or other writ of the kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for the murder, to produce the writ or warrant, without showing the judgment or decree. *Rogers's case*, *Foster*, 312. So in case of a warrant obtained from a magistrate by gross imposition, and false information touching the matters suggested in it. *Curtis's case*, *Foster*, 135, 311. So though the warrant itself be not in strictness lawful, as if it express not the cause particularly enough, yet, if the matter be within the jurisdiction of the party granting the warrant, the killing of the officer in the execution of his duty is murder; for he cannot dispute the validity of the warrant, if it be under the seal of the justice, &c. 1 *Hale*, *P. C.* 460. In all kinds of process, both civil and criminal, the falsity of the charge contained

in such process, that is, the injustice of the demand in one case, or the party's innocence in the other, will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice. 1 *East*, *P. C.* 310; 1 *Hale*, *P. C.* 457.

The provisions with regard to the issuing and service of warrants, and the duties generally of justices out of sessions, with respect to persons charged with indictable offences, are now embodied in the statute 11 & 12 Vict. c. 42.

If the process be defective in the frame of it, as if there be a mistake in the name or addition of the party, or if the name of the party or of the officer be inserted without authority, and after the issuing of the process, and the officer in attending to execute it be killed, this is only manslaughter in the party whose liberty is invaded. *Foster*, 312; 1 *East*, *P. C.* 310. The prisoner, who had been arrested and rescued, declared that if Welsh, the officer, attempted to arrest him again, he would shoot him. A writ of rescue was made out and carried to the office of Mr. Deacle, who acted for the under-sheriff of the county, to have the warrants made out. The under-sheriff's custom was to deliver to Deacle, sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion should require. Deacle made out a warrant against the prisoner on one of these blank pieces of paper, and delivered it to Welsh, who inserted therein the names of two other persons, on the 12th of July. In executing this warrant, one of these persons, in getting into the house to assist in the arrest, was shot by the prisoner. Upon a reference to the judges, they certified that the offence in point of law amounted only to manslaughter. *Stockley's case*, 1 *East*, *P. C.* 310. So where the name of another sheriff's officer was inserted in a sheriff's warrant, after it had been signed and sealed, the arrest by the substituted officer was held illegal. *Stevenson's case*, 19 *St. Tr.* 846. But where the name of an officer is inserted before the warrant is sent out of the sheriff's office, it seems the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. 1 *Russ. by Grea.* 620. Thus, where the names of two officers were interlined in a writ of possession, after it was sealed, but before it left the sheriff's office, and in executing it one of the officers was wounded, the party wounding having been indicted under 43 Geo. 3, c. 58, and convicted, the judges held the conviction right. *Harris's case*, 1 *Russ. by Grea.* 620. But where a magistrate kept a number of blank warrants ready signed, and, on being applied to, filled up one of them and delivered it to an officer, who in attempting to make the arrest was killed, it was held that this was murder in the party killing. *Per Lord Kenyon*, *R.* v. *Inhab. of Winwick*, 8 *T. R.* 454.

A justice's warrant, commanding a constable to apprehend and bring before him the body of A. to answer all such matters and things as on her Majesty's behalf shall be objected against him, on oath, by B., for an assault committed upon B., on &c., is bad; as not showing any information on oath upon which the warrant issues. 1 *Q. B.* 889.

Under this head it may properly be considered how far any defect in the frame of the process, or any other illegality in the arrest, will be a defence to a third person interfering to prevent it, and killing the officer in so doing. The question is put by Mr. East in this form. How far the mere view of a person under arrest, or about to be arrested, supposing it to be illegal, *is of itself* such a provocation to a

bystander, as will extenuate his guilt in killing the officer, in order to set the party free, or prevent the arrest? In the following case it was held, by seven of the judges against five, that it was such a provocation. One Bray, constable of St. Margaret's, Westminster, came into St. Paul's, Covent Garden, and without warrant, took up one Ann Dekins, as a disorderly person, though she was innocent. The prisoners, strangers to Dekins, meeting her in Bray's custody, drew their swords, and assaulted Bray to rescue her; but on his showing his staff, and declaring he was about the Queen's business, they put up their swords, and he carried her to the round-house in Covent Garden. Soon afterwards the prisoners drew their swords and assaulted Bray, in order to get the woman discharged. Whereupon Bray called Dent to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners, when one of the prisoners, before any stroke received, gave Dent a mortal wound. All the judges, except one, agreed that Bray acted without any authority; but that one thought showing his staff was sufficient, and that with respect to the prisoners, he was to be considered as a constable *de facto*. But the main point upon which they differed was, whether the illegal imprisonment of a stranger was, under these circumstances, a sufficient provocation to bystanders; or, in the language of Lord Holt, a provocation to all the subjects of England. Five judges held the case to be murder, and thought that it would have been a sufficient provocation to a relation or a friend, but not to a stranger. The other seven judges, who held it to be manslaughter, thought that there was no ground for making such a distinction, and that it was a provocation to all, whether strangers or others, so as to reduce the offence to manslaughter, it being a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue one who was unlawfully restrained of her liberty. *Tooley's case*, 2 *Lord Raym.* 1296; 1 *East*, *P. C.* 325. The resolution of the seven judges in this case has been commented upon with much force by Mr. Justice Foster. The prisoners, he observes, upon the first meeting, drew their swords upon the constables, who were unarmed, but put them up, appearing, on cool reflection, to be pacified. At the second meeting, the constable received his death-wound, before any blow given or offered by him or his party; that there was no pretence of a rescue; for, before the second encounter, the woman had been lodged in the round-house, which the soldiers could not hope to force; so that the second assault upon the constable seemed rather to be grounded upon resentment, or a principle of revenge for what had passed, than upon any hope to rescue the woman. He concludes with expressing an opinion, that the doctrine advanced in this case is utterly inconsistent with the known rules of law, touching a sudden provocation in the case of homicide, and, which is of more importance, inconsistent with the principles upon which all civil government is founded, and must subsist. *Foster*, 314, 315; 1 *East*, *P. C.* 326. In a recent case also, upon *Tooley's case* being cited, Alderson, J., observed that it had been overruled. *Warner's case*, 1 *Moo. C. C.* 388.

The majority of the judges, in the preceding case, appear to have grounded their opinion upon two former decisions. The first of these is thus stated by *Kelynge*. Berry and two others pressed a man without authority. The man quietly submitted, and went along with them. The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry

showed them a paper, which the prisoner and his companions said was no warrant, and immediately drawing their swords to rescue the impressed man, thrust at Berry. On this, Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. *Hugget's case*, *Kel.* 52. Lord Hale's report of this case is more brief. A press-master seized B. for a soldier, and with the assistance of C. laid hold on him; D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C. By the advice of all the judges, except very few, it was ruled that this was but manslaughter. 1 *Hale*, *P. C.* 465. The judges were, however, divided in opinion, four holding that it was murder, eight that it was manslaughter. *Foster*, 314. Mr. Justice Foster is inclined to rest the authority of this case upon the ground of its having been a sudden quarrel and affray, causing a combat between the prisoner and the assistant of the press-master; and he observes, that Hale, who, at the conference, concurred in opinion with those who held it to be manslaughter only, says nothing touching the provocation which an act of oppression towards individuals might be supposed to give to the bystanders. He admits, however, that the case, as reported in *Kelynge*, does indeed turn upon the illegality of the trespass, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion, to attempt a rescue. *Foster*, 314. The other case, referred to in *Tooley's case*, was that of Sir Henry Ferrers. Sir Henry Ferrers being arrested for debt upon an illegal warrant, his servant, in attempting to rescue him, as was pretended, killed the officer. But, upon the evidence, it appeared that Sir H. Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant, and the servant was acquitted of the murder and manslaughter. *Sir H. Ferrers's case*, *Cro. Car.* 371. Upon this case, Mr. Justice Foster observes, that from the report it does not appear upon what provocation the quarrel and affray began, and that it is highly probable that no rescue was thought of, or attempted. *Foster*, 313.

This doctrine underwent some discussion in a later case. The prisoner was tried at the Old Bailey, for the murder of an assistant to a constable, who had come to arrest a man named Farmello, (with whom the prisoner cohabited,) as a disorderly person, under 19 Geo. 2, c. 10. Farmello, though not an object of the act, made no resistance, but the prisoner immediately, on the constable and his assistant requiring Farmello to go along with them, without any request to desist, and without speaking, stabbed the assistant. Hotham, B., said it was a very different case from what it would have been if the blow had been given by Farmello himself. If he, when the constable entered the room with an insufficient warrant, had immediately, in his own defence, rather than suffer himself to be arrested, done the deed, the homicide would have been lessened to the crime of manslaughter. The offence also might have been of a different complexion in the eye of the law, if the prisoner had been the lawful wife of Farmello; but standing in the light she did, she was to be considered an absolute stranger to him, a mere stander-by, a person who had no right whatever to be in any degree concerned for him. Thus, being a stranger, and having, before any person had been touched, and when the officers had only required Farmello to go with them, and without saying a word to prevent the intended arrest, stabbed the assistant, she was guilty of murder. He then adverted

to *Hugget's case*, and *Tooley's case*, (*supra*,) and observed, that the circumstances there were extremely different from those of the present case. Mr. Justice Gould and Mr. Justice Ashurst concurred in this opinion; but it was thought fit that the jury should find a special verdict, as the case was one of great importance. A special verdict was accordingly found, and the case was subsequently argued before ten of the judges, but no judgment was given, the prisoner either being discharged, or having made her escape from prison, during the riots in 1780. It is said, that the judges held the case to be manslaughter only. *Adey's case*, 1 *Leach*, 206; 1 *East*, *P. C.* 329 (*n.*); 1 *Russ. by Grea.* 635 (*n.*), citing *R.* v. *Porter*, 9 *C. & P.* 778.

Although it is intimated by Lord Hale, as well as by Hotham, B., in the preceding case, that a distinction may exist between the case of servants and friends, and that of a mere stranger, yet it must be confessed, says Mr. East, that the limits between both are no where accurately defined. And after all, the nearer or more remote connection of the parties with each other, seems more a matter of observation to the jury, as to the probable force of the provocation, and the motive which induced the interference of a third person, than as furnishing any precise rule of law, grounded on such a distinction. 1 *East*, *P. C.* 292; 1 *Russ. by Grea.* 591.

Proof of malice—cases of peace officers killed or killing others in the performance of their duty—notice of their authority.] With regard to persons who, in the right of their offices, are conservators of the peace, and in that right alone interfere in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties killing them should have some notice with what intent they interpose, otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they came to take a part in it. But in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. And if the officer be within his proper district, and known or generally acknowledged to bear the office which he assumes, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. In the night, some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient. *Foster*, 310.

A bailiff or constable, sworn in at the leet, is presumed to be known to all the inhabitants or residents who are bound to attend at the leet, and are consequently bound to take notice that he is a constable; 1 *Hale*, *P. C.* 461; and in such case, the officer, in making the arrest, is not bound to show the warrant. *Id.* 459. But if the constable be appointed in some other way, from which the notoriety of his character could not be presumed, some other circumstances would be required to found the presumption of knowledge. And in the night-time, some notification would be necessary, in the case of a leet constable. But whether in the day or night-time, it is sufficient if he declares himself to be the constable, or commands the peace in the king's name. 1 *Hale*, *P. C.* 461. Where a man, assisting two serjeants-at-mace in the execution of an escape warrant, had been killed, a point was reserved for the opinion of the judges, whether or not sufficient notice of the character in which

the constables came had been given. It appeared that the officers went to the shop, where the party against whom they had a warrant, and the prisoner, who was with him, were; and calling out to the former, informed him that they had an escape warrant against him, and required him to surrender, otherwise they should break open the door. In proceeding to do so, the prisoner killed one of the serjeant's assistants. Nine of the judges were of opinion that no precise form of words was required; that it was sufficient that the party had notice, that the officer came not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared in an explicit manner what sort of warrant they had. They said that an escape does not *ex vi termini*, or in notion of law, imply any degree of force or breach of the peace, and consequently the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and they concluded, that, for want of this due notice, the officers were not to be considered as acting in the discharge of their duty. *Curtis's case*, *Foster*, 135.

With regard to a *private bailiff* or *special bailiff*, it must either appear that the party resisting was aware of his character, or there must be some notification of it by the bailiff, as by saying *I arrest you*, which is of itself sufficient notice; and it is at the peril of the party if he kills him after these words, or words to the same effect, and it will be murder. 1 *Hale*, *P. C.* 461; *Mackally's case*, 9 *Co.* 69, *b*; 1 *Russ. by Grea.* 627. It is said also, that a private bailiff ought to show the warrant upon which he acts, if it is demanded. 1 *Russ. by Grea.* 627; *citing* 1 *Hale*, *P. C.* 583, 588, 589. It seems, however, that this must be understood of a demand made, after submitting to the arrest. The expression in *Hale* (459,) is, "such person must show his warrant, or signify the contents of it;" and it appears, from the authority of the same writer, *supra*, that even the words "I arrest you," are a sufficient signification of the officer's authority.

Proof of malice—cases of peace officers killed or killing others in the execution of their duty—mode of executing their duty.] In cases of *felony actually* committed, if the offender will not suffer himself to be arrested, but stands upon his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether public officers or private persons, with or without a warrant, he may be lawfully killed by them. *Hawk. P. C. b.* 1, *c.* 28, *s.* 11. Where, says Mr. Justice Foster, a felony is committed, and the felon flies from justice, and a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if, in the pursuit, the party flying is killed, *where he cannot be otherwise overtaken*, it is justifiable homicide. *Foster*, 271.

In case an innocent person is *indicted for felony*, and will not suffer himself to be arrested by the officer *who has a warrant for that purpose*, he may be lawfully killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer. *Hawk. P. C. b.* 1, *c.* 28, *s.* 12. It seems, however, that a constable, or other peace officer, is bound to arrest a person *indicted* of felony, *without a warrant*, and that therefore, if it be not possible otherwise to apprehend him, he will be justified in killing him, although he have no warrant. See 1 *East*, *P. C.* 300.

Whether or not a peace officer who attempts, without a warrant, to

apprehend a person on *suspicion of felony*, will be justified in killing him, in case he cannot otherwise apprehend him, is a case requiring great consideration. Even in the instance of breaking open the outward door of a house, a peace officer is not justified, unless he is acting under a warrant, in proceeding to that extremity; *Foster*, 321, *and vide post*, 743; still less could he be justified in a matter concerning life. However, according to Lord Hale, the officer would be justified in killing the party if he fly, and cannot otherwise be apprehended. 2 *Hale, P. C.* 72, 80.

In cases of *misdemeanors*, the law does not admit the same severe rule as in that of felonies. The cases of arrests for misdemeanors and in civil proceedings are upon the same footing. *Foster*, 271. If a man charged with a misdemeanor, or the defendant in a civil suit flies, and the officer pursues, and in the pursuit kills him, it will be murder. 1 *Hale, P. C.* 481; *Foster*, 451. Or rather, according to Mr. Justice Foster, it will be murder or manslaughter, as circumstances may vary the case. For if the officer, in the heat of the pursuit, and merely to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should ensue, it seems that this would amount to no more than manslaughter, and in some cases not even to that offence. But if he had made use of a deadly weapon, it would have amounted to murder. *Foster*, 271.

If persons engaged in a riot, or forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of the peace, &c., or resist such justice endeavouring to arrest them, the killing of them may be justified, and so perhaps may the killing of any dangerous rioters by private persons, who cannot otherwise suppress them, or defend themselves from them. *Hawk. P. C. b.* 1, *c.* 28, *s.* 14.

It is to be observed, that in all the above cases where the officer is justified by his authority, and exercises that authority in a legal manner, if he be resisted, and in course of that resistance is killed, the offence will amount to murder.

With regard to the point of time at which a constable or other peace officer is justified, in case of resistance, in resorting to measures of violence, it is laid down, and although in the case of common persons, it is their duty, when they are assaulted, to fly as far as they may, in order to avoid the violence, yet a constable or other peace officer, if assaulted in the execution of his duty, is not bound to give way, and if he kills his assailant, it is adjudged homicide in self-defence. 1 *Hale, P. C.* 481. This rule holds in the case of the execution of civil process, as well as in apprehensions upon a criminal charge. *Hawk. P. C. b.* 1, *c.* 28, *s.* 17. But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. Therefore, when a collector, having distrained for duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to them to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that the prisoner was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and the officer kills, it will be murder. So if the officer kills the party after the resistance is offered, and the necessity has ceased, it is manslaughter at least, and

if the blood had time to cool, it would, it seems, be murder. 1 *East, P. C.* 297.

In respect to the time of executing process, it may be done at night as well as by day; and therefore killing a bailiff, or other officer, under pretence of his coming at an unseasonable hour, would be murder. But since the statute 29 Car. 2, c. 7, s. 6, all process warrants, &c., served or executed on a Sunday are void, except in cases of treason, felony, or breach of the peace, and therefore an arrest on any other account, made on that day, is the same as if done without any authority at all. 1 *East, P. C.* 324. But see now 11 & 12 Vict. c. 42, s. 4.

In executing their duty, it often becomes a question in what cases constables and other peace officers are justified in breaking open windows and doors. In no case whatever is an officer justified in breaking an outward door or window, unless a previous notification has been given, and a demand of entrance made and refused. *Foster*, 320; *Hawk. P. C. b.* 2, *c.* 14, *s.* 1.

Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender without any warrant, but in cases of misdemeanors and breach of the peace, a warrant is required; it likewise seems to be the better opinion that mere suspicion of felony will not justify him in proceeding to this extremity, unless he be armed with a warrant. *Foster*, 320, 321; *Hawk. P. C. b.* 2, *c.* 14, *s.* 7; 1 *Russ. by Grea.* 628; *Sed vide* 1 *Hale, P. C.* 583; 2 *Id.* 92.

In cases of writs, an officer is justified in breaking an outer door upon a *capias*, grounded on an indictment for any crime whatever, or upon a *capias* to find sureties for the peace, or the warrant of a justice for that purpose. *Hawk. P. C. b.* 2, *c.* 14, *s.* 3. So upon a *capias utlagatum*, or *capias pro fine*: *Id.* 1 *Hale, P. C.* 459, or upon an *habere facias possessionem*; 1 *Hale, P. C.* 458, or upon the warrant of a justice of the peace for levying a forfeiture in execution of a judgment or conviction. *Hawk. P. C. b.* 2, *c.* 14, *s.* 5.

If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a constable having notice of it, and demanding entrance, and being refused, and the affray continuing, may break open the doors to keep the peace. 2 *Hale, P. C.* 95; *Hawk. P. C. b.* 2, *c.* 14, *s.* 8. And if there be disorderly drinking or noise in a house at an unseasonable hour of the night, especially in inns, taverns, or alehouses, the constable orhis watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 *Hale, P. C.* 95; 1 *East, P. C.* 322. So if affrayers fly to a house, and he follows them with fresh suit, he may break open the doors to take them. *Hawk. P. C. b.* 1, *c.* 63, *s.* 16. But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant, and it is said, that at least there must be some circumstances of extraordinary violence to justify him in so doing. 1 *Russ. by Grea.* 294 (*n*).

In civil suits, an officer cannot justify the breaking open an outward door or window to execute the process; if he do break it open, he is a trespasser. In such case, therefore, if the occupier resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose to himself and his family. It is not murder, because it was unlawful for the officer to break into the house, but it is manslaughter, because he knew him to be a bailiff. Had he not known him to be a bailiff, it would have

been no felony, because done in his house. 1 *Hale, P. C.* 458. This last instance, says Mr. East, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent, and that the party did not know, or had reason to believe, that he was only a trespasser. 1 *East, P. C.* 321, 322.

The privilege is confined to the *outer doors* and windows only—for if the sheriff or a peace officer enter a house by the outer door, being open, he may break open the inner doors, and the killing in such case would be murder. 1 *Hale, P. C.* 458. If the party whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may break open any inner doors or windows to search for them, without demanding admission. *Per Gibbs, J., Hutchinson* v. *Birch*, 4 *Taunt.* 619. But it seems that if the party against whom the process has issued be not within the house at the time, the officer must demand admittance before he will be justified in breaking open an inner door. *Ratcliffe* v. *Burton*, 3 *Bos. & Pul.* 223. So if the house be that of a stranger, the justification of the officer will depend upon the fact of the goods or the persons against whom he is proceeding, being in the house at the time. *Cooke* v. *Birt*, 5 *Taunt.* 765; *Johnson* v. *Leigh*, 6 *Taunt.* 240; 1 *Russ. by Grea.* 621. An officer attempting to attach the goods of the prisoner in his dwelling-house, put his hand over the hatch of the door which was divided into two parts, the lower hatch being closed and the higher open. A struggle ensued between the officer and a friend of the prisoner, in the course of which the officer having prevailed, the prisoner shot at and killed him, and this was held murder. *Baker's case*, 1 *East, P. C.* 323. In the above case there was proof of a previous resolution in the prisoner to resist the officer whom he afterwards killed. 1 *East, P. C.* 323.

The privilege likewise extends only to those cases where the occupier or any of his family, who have their domestic or ordinary residence there, are the objects of the arrest; and if a stranger, whose ordinary residence is elsewhere, upon pursuit, takes refuge in the house of another, such house is no castle of *his*, and he cannot claim the benefit of sanctuary in it. *Foster*, 320, 321; 1 *East, P. C.* 323. But this must be taken subject to the limitation already expressed in regard to breaking open inner doors in such cases, *viz.*, that the officer will only be justified by the fact of the person sought being found there. *Supra*; 1 *East, P. C.* 324; 1 *Russ. by Grea.* 631 (*n.*).

The privilege is also confined to arrests *in the first instance*; for if a man legally arrested (and laying hands on the prisoner, and pronouncing the words of arrest, constitute an actual arrest), escape from the officer, and take shelter in his own house, the officer may, upon fresh pursuit, break open the outer door, in order to retake him, having first given due notice of his business, and demanded admission, and having been refused. If it be not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate. 1 *Hale, P. C.* 459; *Foster*, 320; 1 *East, P. C.* 324.

Proof of malice—cases of officers killed or killing others in the execution of their duty—mode (where an officer is killed) in which that killing has been effected.] It is a matter of very serious consideration, whether in all cases where a peace officer or other person is killed while attempting to enforce an illegal warrant, such killing shall,

under circumstances of great cruelty or unnecessary violence, be deemed to amount to manslaughser only. In *Curtis's case, Foster*, 135, *ante*, p. 741, the prisoner being in the house of a man named Cowling, who had made his escape, swore that the first person who entered to retake Cowling should be a dead man, and, immediately upon the officers breaking open the door, struck one of them on the head with an axe and killed him. This was held murder, and a few of the judges were of opinion, that even if the officers could not have justified breaking open the door, yet that it would have been a bare trespass in the house of Cowling, without any attempt on the property or person of the prisoner; and admitting that a trespass in the house, with an intent to make an unjustifiable arrest of the owner, could be considered as some provocation to a by-stander, yet surely the knocking a man's brains out, or cleaving him down with an axe, on so slight a provocation, savoured rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty, and it ought always to be remembered, that in all cases of homicide upon sudden provocation, the law indulges to human frailty, and to that alone. So in *Stockley's case, ante*, p. 737, the fact that the prisoner deliberately resolved upon shooting Welsh, in case he offered to arrest him again, was, it has been argued, sufficient of itself to warrant a conviction for murder, independently of the legality of the warrant. 1 *East, P. C.* 311.

When a bailiff, having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, and the man not knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword hanging in his chamber, and stabbed the bailiff, whereof he died; this was held not to be murder, for the prisoner did not know but that the party came to rob or kill him, when he thus violently broke into his chamber without declaring his business. 1 *Hale, P. C.* 470. A bailiff having a warrant to arrest C. upon a *ca. sa.* went to his house and gave him notice. C, threatened to shoot him if he did not depart, but the bailiff, disregarding the threats, broke open the windows, upon which C. shot and killed him. It was ruled, 1, that this was not murder, because the bailiff had no right to break the house; 2, that it was manslaughter, because C. knew him to be a bailiff: but, 3, had he not known him to be a bailiff, it had been no felony, because done in defence of his house. *Cook's case*, 1 *Hale, P. C.* 458; *Cro. Car.* 537; *W. Jones*, 429.

These decisions would appear to countenance the position that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation, this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. In *Thompson's case*, 1 *Moo. C. C.* 80, *ante*, p. 709, where the officer was about to make an arrest on an insufficient charge, the judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases, it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and

to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in *Stockley's case* (*ante*, p. 737), and *Curtis's case* (*ante*, p. 741), the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such from the operation of the general rule (*vide ante*, p. 721), that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "It may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer." 1 *East, P. C.* 328.

It may be remarked, that the question is fully decided in the Scotch law, the rule being as follows:—In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. *Alison's Princ. Cr. Law of Scotl.* 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 *Hume*, 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of these, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only. *Alison's Princ. Cr. Law of Scotl.* 28; see also 1 *Russ. by Grea.* 621 (*n.*)

In case of death ensuing, where resistance is made to officers in the execution of their duty, it sometimes becomes a question how far the acts of third persons, who take a part in such resistance, or attempt to rescue the prisoner, shall be held to affect the latter. If the party who is arrested yield himself, and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, it is murder in them, but not in the party arrested; otherwise, if he do any act to countenance the violence of the rescuers. *Stanley's case*, *Kel.* 87; 1 *Russ. by Grea.* 536. Jackson and four other robbers being pursued by the hue and cry, Jackson turned round upon his pursuers, the rest being in the same field, and refusing to yield, killed one of them. By five judges who were present, this was held murder, and inasmuch as all the robbers were of a company, and made a common resistance, and one animated the other, all those who were of the company in the same field, though at a distance from Jackson, were all principals, viz., present, aiding, and abetting. They also resolved, that one of the malefactors being apprehended a little before the party was hurt, and being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated Jackson to kill the party. 1 *Hale, P. C.* 464. Where A. beat B., a constable, in the execution of his duty, and they parted, and then C., a friend of A., fell upon the constable, and killed him in the struggle, but A. was not engaged in

the affair, after he parted from B., it was held that this was murder only in C., and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to ill-use the constable. *Anon.* 1 *East, P. C.* 296.

It is matter of fact, for the jury in these cases, to determine in what character the third party intervened. If he interfered for the purpose of aiding the person in custody to rescue himself, and in so doing killed the bailiff, it would be murder, but if, not knowing the cause of the struggle, he interposed with intent to prevent mischief, it would not amount to murder. 1 *East, P. C.* 318; 1 *Russ. by Grea.* 536. See *Kel.* 86; *Sid.* 159.

The prisoners were indicted for murder. It appeared that a body of persons had assembled together, and were committing a riot. The constables interfering for the purpose of dispersing the crowd and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely and afterwards died. The prisoners all took part in the violence used, some by beating him with sticks, some by throwing stones, and some by striking him with their fists. Alderson, B., told the jury that in considering the case, they would have to determine whether all the prisoners had the common intent of attacking the constables, if so each of them was responsible for all the acts of all the others done for that purpose, and if all the acts done by each if done by one man, would together show such violence, and so long continued, that from them the jury might infer an intention to kill the constable, it would be murder in them all, but if they could not infer such an intention that they ought to find them guilty of manslaughter. The prisoners were convicted of the latter offence. *Macklin's case*, 2 *Lewin, C. C.* 225.

Proof of malice—private persons, killed or killing others, in apprehending them.] The rules regarding the protection of private persons who take upon themselves to arrest offenders, is much more confined than that which is applicable to peace officers and others, who act only in the execution of their duty. It must, however, be remembered, that where a private person lends his assistance to a constable, whether commanded to do so or not, he is under the same protection as the officer himself. *Foster*, 309. So in cases of felony actually committed, or a dangerous wound given, private persons may apprehend without a warrant, and will be protected, so that the killing of them in the executing that duty, will be murder; but it is otherwise, where there is merely a reasonable suspicion of a felony, *ante*, p. 727. Whether or not a private person ought to enjoy the protection extended to peace officers, where he proceeds to arrest a person who stands *indicted* of felony, does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such case, because a person innocent may be indicted, and because there is another away of bringing him to answer, viz., process of *capias* to the sheriff, who is a known responsible officer. 2 *Hale, P. C.* 84. The reasoning of Mr. East, however, is rather in favour of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavour to arrest him, in order to bring him to justice, it cannot be truly said, that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons if it may be made without the death of the

felon. (*Dalton*, *c*. 170, *s*. 5.) And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose be *primâ facie* evidence of the fact, till the contrary should be proved. 1 *East*. *P*. *C*. 300.

There is one class of misdemeanors in which private persons are justified in interposing, and are under the same protection as peace officers, namely, in case of sudden affrays to part the combatants, and to prevent mischief; but in these cases they must give express notice of their friendly intent, and if the party interposing with such notice, is killed by the affrayers, it will be murder in the party killing. *Foster*, 272, 311. And it is said by Hawkins, that perhaps private persons may justify the killing of dangerous rioters, when they cannot otherwise suppress them or defend themselves from them, inasmuch as every person seems to be authorised by law, to arm himself for such purposes. *Hawk*. *P*. *C*. *b*. 1, *c*. 28, *s*. 14. And this was so resolved by all the judges in Easter Term, 39 Eliz., though they thought it more discreet for any one in such a case to attend and assist the king's officer in so doing. *Poph*. 121; 1 *East*, *P*. *C*. 304. It is said by Hawkins, that at common law every private person may arrest any suspicious *night-walker*, and detain him till he give a good account of himself. *Hawk*. *P*. *C*. *b*. 2, *c*. 13, *s*. 6. But it is doubtful how far such a power is vested even in peace officers, (*vide ante*, p. 730,) and it is still more doubtful with regard to private persons. See 1 *Russ*. *by Grea*. 601.

In general, in cases of misdemeanor, except in those above-mentioned, a private person will not be justified in apprehending the offender, and if in attempting to apprehend him he kill him, it will be murder. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun to take the ghost, and upon meeting with a person dressed in white, immediately shot him. Macdonald, C. B., Rooke, and Lawrence, JJ., were clear that this was murder, as the person who appeared to be a ghost, was only guilty of misdemeanor, and no one might kill him, although he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the Court said that they could not receive that verdict, and told the jury that if they believed the evidence, they must find the prisoner guilty of murder; and that if they did not believe the evidence, they should acquit the prisoner. The jury found the prisoner guilty, and sentence was pronounced, but he was afterwards reprieved. *Smith's case*, 1 *Russ*. *by Grea*. 546; 4 *Bl*. *Com*. 201. (*n*.)

By various statutes, private persons, the owners of property injured, are authorised, as also their servants, to make arrests, as under the 7 and 8 Geo. 4, cc. 29, 30, *ante*, p. 731.

Gamekeepers, &c., have authority to arrest in certain cases by the 9 Geo. 4, c. 69, s. 2, and the 7 & 8 Vict. c. 29, s. 1; see the clauses, *ante*, pp. 537, 541. Under the 9 Geo. 4, c. 69, s. 9, it has been held that a gamekeeper, &c., is entitled to arrest a party for an offence under the 9th section, though the above clause (s. 2,) speaks only of offences *thereinbefore* mentioned, for an offence under s. 9, is an offence also under s. 1. *Ball's case*, 1 *Moo*. *C*. *C*. 330. A gamekeeper and his assistants warned a party of poachers off his master's grounds, and followed them into the highway, where the poachers rushed upon the keeper and his men, and blows ensued on both sides. After the keeper had struck several blows, a shot was fired by the prisoner, one

of the party, which wounded the prosecutor. The prisoner was indicted under the 9 Geo. 4, c. 31, for shooting at the prosecutor with intent to kill, &c. It was urged for the prisoner, that as the keeper had knocked down three of the men before the shot was fired, it would have been manslaughter only if death had ensued; but the judge (Bayley, B.,) was of opinion that if the keeper struck, not vindictively, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him, it would have been murder if death had ensued. He told the jury that he thought that the keeper and his men, even if they had no right to apprehend, had full right to follow the prisoner and his party, to discover who they were, and that the prisoner and his party were not warranted in attempting to prevent them, and that if they had attempted to apprehend them, which, however, they did not, he thought they would have been warranted by the statute in so doing. The prisoner being convicted, on a case reserved, the judges were of opinion that the keeper had power to apprehend, and that notwithstanding the blows given by the keeper, it would have been murder, had the keeper's man died. *Ball's case*, 1 *Moo. C. C.* 330. The rule laid down in the above case, with regard to blows first given by the keeper in self-defence, was soon afterwards recognised in another case. *Ball's case*, 1 *Moo. C. C.* 333. A gamekeeper and his assistants proceeded to apprehend a party of poachers whose guns they heard in a wood. They rushed in upon the poachers, who ran away, and the keeper followed, one of the poachers exclaiming, "the first man that comes out, I'll be damn'd if I don't shoot him." At length several of the poachers stopped, and the prisoner, one of them, putting his gun to his shoulder, fired at and wounded the prosecutor; being indicted for this offence, it was objected that it was incumbent on the prosecutor to have given notice to the persons by calling upon them to surrender, which he did not appear to have done; the judge reserved the point, and the judges were all of opinion that the circumstances constituted sufficient notice, and that the conviction was right. *Payne's case*, 1 *Moo. C. C.* 378. Upon an indictment for murder, it appeared that the prisoner, being poaching at night in a wood, was attempted to be apprehended by the deceased, the servant of the prosecutor. The prosecutor was neither the owner nor occupier of the wood, nor the lord of the manor, having only the permission of the owner to preserve the game there. The deceased having been killed by the prisoner in the attempt to apprehend him, it was held to be manslaughter only. *Addis's case*, 6 *C. & P.* 388. Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, and they waited in a turnpike road expecting the poachers to come there, which they did, and an affray ensued between the gamekeepers and the poachers. Wightman, J., held, that if the gamekeepers were there endeavouring to apprehend the poachers they were not justified in so doing. *Meadham's case*, 2 *C & K.* 633.

In these cases a question frequently arises how far the companions of the party who actually committed the offence participate in the guilt. The prisoners were charged with shooting James Mancey, with intent to murder. It appeared that the prisoners, each having a gun, were out at night in the grounds of C. for the purpose of shooting pheasants, and the prosecutor and his assistants going towards them for the purpose of apprehending them, they formed into two lines, and pointing their guns at the keepers, threatened to shoot them. A gun was fired,

and the prosecutor was wounded. Some of the keepers were also severely beaten, but no other shot was fired. It was objected that as there was no common intent to commit any felony, Mancey alone could be convicted, but Vaughan, B., said, "I am of opinion that when this act of parliament (57 *Geo.* 3, *c.* 90, *repealed by* 9 *Geo.* 4, *c.* 69,) empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power which the law affords to constables in the execution of their duty. With respect to the other point, it is rather a question of fact for the jury; still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it." *Edmeads's case*, 3 *C. & P.* 390. So, when two persons had been seized by a gamekeeper and his assistants, and while standing still in custody, called to another man, who coming up, rescued the two men, and beat and killed one of the keeper's party; Vaughan, B., ruled that all the three men were equally guilty, though, if the two had acquiesced and remained passive, it would not have been so. *Whithorne's case*, 3 *C. & P.* 324. See *ante, title Game.*

Proof of malice—killing in defence of person or property.] The rule of law upon this subject is thus laid down by Mr. East. A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavours by *violence* or *surprise* to commit a known felony, such as rape, robbery, arson, burglary, or the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing, it is justifiable self-defence; as on the other hand, the killing by such felons, of any person so lawfully defending himself, will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act, indicative of such an intention, will not warrant him in killing that other by way of precaution, there being no actual danger at the time. 1 *East, P. C.* 271, 272. Not only is the party himself, whose person or property is the object of the felonious attack justified in resisting, in the manner above mentioned, but a servant or any other person may lawfully interpose, in order to prevent the intended mischief. Thus in the instances of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do, but subject to the same limitations. (*Sed vide post*, p. 755.) In this case there seems to be no difference between the case of the person assaulted, and those who come in aid against such felons. The legislature itself seems to have considered them on the same footing, for in the case of the Marquis de Guiscard, who stabbed Mr. Harley while sitting in council, they discharged the party who gave the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (9 Ann, c. 16.) 1 *East, P. C.* 289; *Foster*, 274; *Cooper's case*, *Cro. Car.* 544.

With regard to the nature of the intended offence, to prevent which, it is lawful instantly to use the last violence, and to put the assailant to death, it is only to such crimes as in their nature betoken an urgent

necessity, which admits of no delay, that the rule extends. Of this nature are what have been termed *known* felonies, in contra-distinction as it seems to such secret felonies as may be committed without violence to the person, such as picking the pocket, &c. *Foster*, 274; 1 *East, P. C.* 273. Where an attempt is made to murder, or to rob, or to ravish, or to commit burglary, or to set fire to a dwelling-house, if the attack be made by the assailant with violence and by surprise, the party attacked may lawfully put him to death. *Ibid.*

A statute was passed in the 24 Hen. 8 (c. 5), upon this subject, in affirmance of the common law. After reciting that it had been doubted whether if any person should attempt feloniously to rob or murder any persons in or near any common, highway, cartway, or footway, or in their mansions, messuages, or dwelling-places, or attempt to break any dwelling-house in the night-time, and should happen in such felonious intent to be slain by those whom they should attempt so to rob or murder, by any person being in their dwelling-house attempted to be broke open, the person so happening to slay the person so attempting to commit murder or burglary, should forfeit goods and chattels; enacts that if any person or persons be indicted or appealed, of or for the death of any such evil disposed person or persons attempting to rob, murder, or burglariously to break mansion-houses, as is above said, the person or persons so indicted or appealed thereof, and of the same by verdict so found and tried, shall not forfeit or lose any lands, tenements, goods, or chattels, for the death of any such evil disposed person in such manner slain, but shall be thereof, and for the same, fully acquitted and discharged. Though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide, which stand upon the same footing of reason and justice. Thus the killing of one who attempts the wilful burning of a house, is free from forfeiture, without the aid of the statute; and though it only mentions the breaking a house in the night-time (which must be intended a breaking accompanied with a felonious intent), yet, a breaking in the day-time with a like purpose must be governed by the same rule. 1 *East, P. C.* 272, 273.

The rule extends to *felonies* only. Thus, if one comes to beat another, or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him, it will be manslaughter. 1 *Hale, P. C.* 485, 486; 1 *East, P. C.* 272.

It is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified in making the resistance, as in the following case. Levet being in bed and asleep, his servant, who had procured Frances Freeman to help her in her work, went to the door, about twelve o'clock at night, to let her out, and conceived she heard thieves about to break into the house. Upon this she awakened her master, telling him what she apprehended. He took a drawn sword, and the servant fearing that Freeman should be seen, hid her in the buttery. Mrs. Levet seeing Freeman in the buttery, and not knowing her, conceived her to be the thief, and called to her husband, who entering the buttery in the dark, and thrusting before him with his sword, struck Freeman under the breast, of which wounds she instantly died. This was ruled to be misadventure only. *Levet's case, Cro. Car.* 538; 1 *Hale,*

P. C. 42, 474. Possibly, says Mr. Justice Foster, this might have been ruled manslaughter, due circumspection not having been used. *Foster*, 299.

Whether a person who is *assaulted* by another will be justified in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault, and the circumstances under which it is committed. It may be of such a character that the party assailed may reasonably apprehend death, or great violence to his person, as in the following case:—Ford being in possession of a room at a tavern, several persons persisted in having it, and turning him out, but he refused to submit, when they drew their swords upon Ford and his company, and Ford, drawing his sword, killed one of them, and it was adjudged justifiable homicide. Both in Kelynge and in Foster a *quære* is added in this case. But Mr. East observes, that though the assailants waited till Ford had drawn his sword (which by no means appears), yet if more than one attacked him at the same time (and as he was the only one of the party who seems to have resisted, such probably was the case), the determination seems to be maintainable. *Ford's case, Kel.* 51; 1 *East, P. C.* 243. So in *Mawgridge's case*, great violence was held justifiable in the case of a sudden assault. Mawgridge, upon words of anger, threw a bottle with great force at the head of Cope, and immediately drew his sword. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him, whereupon Mawgridge stabbed Cope, which was ruled to be murder; for Mawgridge, in throwing the bottle, showed an intention to do some great mischief, and his drawing immediately showed that he intended to follow up the blow. *Mawgridge's case, Kel.* 121; 2 *Lord Raym.* 1489; *Foster*, 296. Upon this case, Mr. East has made the following remarks:—The words previously spoken by Cope could form no justification for Mawgridge, and it was reasonable for the former to suppose his life in danger, when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life, and this at a time when he was off his guard, and without any warning. The latter circumstance furnishes a main distinction between this case and that of death ensuing from a combat, where both parties engage upon equal terms, for then, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon, suspend his arm till he has warned the other, and given him time to put himself upon his guard, and afterwards they engage upon equal terms; in such case it is plain that the intent of the person making such assault is not so much to destroy his adversary, at all events, as to combat with him, and run the hazard of losing his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood. But if several attack a person at once with deadly weapons, as may be supposed to have happened in *Ford's case* (*supra*), though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence, because so unequal an attack resembles more a desire of assassination than of combat. 1 *East, P. C.* 276.

An assault with intent to *chastise*, although the party making the assault has no legal right to inflict chastisement, will not justify the party assaulted in killing the assailant. The prisoner, who was

indicted for the murder of his brother, appeared to have come home drunk on the night in question. His father ordered him to go to bed, but he refused, upon which a scuffle ensued between them. The deceased, a brother of the prisoner, who was in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him, and beat him, the prisoner not being able to avoid his blows, or to make his escape. As they were struggling together, the prisoner gave his brother a mortal wound with a penknife. This was unanimously held by the judges to be manslaughter, as there did not appear to be any inevitable necessity so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to chastise him for his misbehaviour to his father. *Nailor's case*, 1 *East*, *P. C.* 277. The circumstances in the following case were very similar. The prisoner and the brother of the prosecutor were fighting, on which the prosecutor laid hold of the prisoner to prevent him from hurting his brother, and held him down, but did not strike him, and the prisoner stabbed him with a knife above the knee. The prisoner being indicted for stabbing under the 9 Geo. 4, c. 31, Mr. Justice James Parke said, The prosecutor states that he was merely restraining the prisoner from beating his brother, which was proper on his part. If you are of opinion that he did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck the prisoner any blows, then I think that it would. You will consider whether anything was done by the prosecutor more than was necessary, or whether he gave any blows before he was struck. *Bourne's case*, 5 *C. & P.* 120. At the conference of the judges upon *Nailor's case* (*supra*), Powell, J., by way of illustration, put the following case: If A. strike B. without any weapon, and B. retreat to a wall, and there stab A., it will be manslaughter, which Holt, C. J., said was the same as the principal case, and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, without some dangerous weapon, that the intent of the aggressor rose so high as the death of the party struck, and unless there be a plain manifestation of a felonious intent, no *assault*, however violent, will *justify* killing the assailant under the plea of necessity, 1 *East*, *P. C.* 277. But in order to render the killing in these cases justifiable, it must appear that the act was done from mere necessity, and to avoid the immediate commission of the offence. Thus a person who, in the case of a mutual conflict, would excuse himself upon the ground of self-defence, must show that before the mortal stroke given, he had declined any further combat, and retreated as far as he could with safety, and that he had killed his adversary through mere necessity, and to avoid immediate death. If he fail in either of these circumstances, he will incur the penalty of manslaughter. *Foster*, 277.

Again, to render the party inflicting death under the foregoing circumstances justifiable, it must appear that he was wholly without any fault imputable to him by law in bringing the necessity upon himself. Therefore, where A., with many others, had, on pretence of title, forcibly ejected B. from his house, and B. on the third night returned with several persons with intent to re-enter, and one of B.'s friends attempted to fire the house, whereupon one of A.'s party killed one of B.'s with a gun, it was held manslaughter in A., because

the entry and holding with force were illegal. *Hawk. P. C. b.* 1, *c.* 28, *s.* 22.

It is to be observed, that killing in defence of the person will amount either to justifiable or *excusable homicide*, or *chance-medley*, as the latter is termed, according to the circumstances of the case. Self-defence, upon chance-medley, implies that the party, when engaged in a sudden affray, quits the combat before a mortal wound is given, and retreating as far as he can with safety, urged by necessity, kills his adversary for the preservation of his own life. *Foster*, 276. It has been observed that this case borders very nearly upon manslaughter, and that in practice the boundaries are in some instances scarcely perceptible. In both cases it is presumed that the passions have been kindled on both sides, and that blows have passed between the parties; but in manslaughter, it is either presumed that the combat has continued on both sides till the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. *Foster*, 276, 277. The true criterion between manslaughter and excusable homicide, or chance-medley, is thus stated by Sir William Blackstone. When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence. 4 *Bl. Com.* 184. In all cases of excusable homicide, in self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice. For if one attack another with a dangerous weapon, unprepared, with intent to murder him, that would stand upon a different ground; and in that case, if the party whose life was sought, killed the other, it would be in self-defence, properly so called. But if the first assault be *open malice*, and the flight be feigned as a pretence for carrying that malice into execution it would undoubtedly be murder; for the flight rather aggravates the crime, as it shows more deliberation. 1 *East, P. C.* 282.

Where a trespass is committed merely against the property of another, and without any felonious intent, the law does not admit the force of the provocation to be sufficient to warrant the owner of the property to make use, in repelling the trespasser, of any deadly or dangerous weapon. Thus, if upon the sight of a person breaking his hedges, the owner were to take up a hedge-stake and knock him on the head, and kill him, this would be murder; because the violence was much beyond the provocation. *Foster*, 291; 1 *East, P. C.* 288, *vide supra.* However provoking the circumstances of the trespass may be, they will not justify the party in the use of deadly weapons. Lieutenant Moir, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a gun at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. He had gone home for a gun on seeing the trespasser, but no personal contest had ensued. Being indicted for murder, he was found guilty, and executed. *Moir's case*, 1828. See this case as stated in *Price's case*, 7 *C. & P.* 178. But if the owner use only a weapon not likely to cause death, and with intent only to chastise the trespasser, and death ensue, this will be manslaughter only. *Foster*, 291; 1 *East, P. C.* 288.

Where a person is set to watch premises in the night, and shoots

at and kills another who intrudes upon them, the nature of the offence will depend upon the reasonable ground which the party had to suspect the intentions of the trespasser. Any person, said Garrow, B., in a case of this kind, set by his master to watch a garden or yard, is not at all justified in shooting at, or injuring in any way, persons who may come into those premises even in the night, and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened; and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter. *Scully's case*, 1 *C. & P.* 319.

The rules, with regard to the defence of the possession of a house, are thus laid down. If A., in defence of his house, kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life. But if B. had entered the house, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and assaulted him, and A. had killed him (not being otherwise able to avoid the assault, or retain his lawful possession), it would have been in self-defence. So if A. had entered upon him, and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser, to gain the possession, in such a case, A., being in his own house, need not fly as far as he can, as in other cases of self-defence, for he has the protection of his house to excuse him from flying, as that would be to give up the possession of his house to his adversary. But in this case, the homicide is excusable rather than *justifiable.* 1 *East, P. C.* 287; 1 *Hale, P. C.* 445; *Cook's case, Cro. Car.* 537, *ante*, p. 745.

In the following case, Bayley, J., seems to have been of opinion that a *lodger* does not enjoy the privilege which, as above stated, is possessed by the owner of a house, of standing to its protection without retreating. Several persons tried to break open the door of a house in which the prisoner lodged. The prisoner opened the door, and he and the parties outside began to fight. The prisoner was taken into the house again by another person, but the parties outside broke open the door in order to get at the prisoner, and a scuffle again ensued, in which the deceased was killed by the prisoner with a pair of iron tongs. There was a back-door through which the prisoner might have escaped, but it did not appear that he knew of it, having only come to the house the day before. Bayley, J., said, If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back-door, it would have been his duty to go out backwards, in order to avoid the conflict. *Dakin's case*, 1 *Lewin, C. C.* 166. *Sed vide ante*, p. 750.

Upon an indictment for manslaughter, it appeared that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow; they exerted force, a scuffle ensued, in which the prisoner received a blow on the breast: whereupon she threw a stone at the deceased, upon which he fell down, and was

taken up dead. Holroyd, J., said, "The case fails on two points: it is not proved that the death was caused by the blow, and if it had been, it appears that the deceased received it in an attempt to invade the prisoner's barn against her will. She had a right to defend the barn, and to employ such force as was reasonably necessary for that purpose, and she was not answerable for any unfortunate accident that might happen in so doing." The prisoner was acquitted. *Hinchcliffe's case*, 1 *Lewin*, *C. C.* 161. So where the owner of a public-house was killed in a struggle between him and those who unlawfully resisted his turning them out of his house, it was held murder. Two soldiers came at eleven o'clock at night to a publican's and demanded beer, which he refused, alleging the unreasonableness of the hour, and advised them to go to their quarters, whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company detained on business, one of the soldiers rushed in, the other remaining without, and renewed his demand for beer, to which the landlord returned the same answer. On his refusing to depart, and persisting in having some beer, and offering to lay hold of the deceased, the latter at the same instant collared him, and the one pushing, the other pulling towards the outer door, the landlord received a violent blow on the head from some sharp instrument from the other soldier, which occasioned his death. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them: for the landlord did no more than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence of the prisoners having come a second time, with a deliberate intention to use personal violence, in case their demand was not complied with. *Willoughby's case*, 1 *East*, *P. C.* 288.

The following case illustrates various points which may arise in questions respecting the defence of property. The prisoners were indicted for murder; Meade for having shot one Law with a pistol, and Belt as having been present aiding and abetting him. It appeared that Meade had rendered himself obnoxious to the boatmen at Scarborough, by giving information to the excise of certain smuggling transactions, in which some of them had been engaged; and the boatmen, in revenge, having met with him on the beach, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. The boatmen, however, as he was going away, called to him, that they would come at night and pull his house down. His house was about a mile from Scarborough. In the middle of the night a great number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention; and Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Law, one of the party was killed. The only evidence against Belt was, that he was in the house when the pistol was fired, and a voice having been heard to cry out "fire," it was assumed that it was his voice. Per Holroyd, J., to the jury—A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass. So, if a man with force invades and enters into the dwelling of another. But a man is not authorised to fire a pistol on every intrusion or invasion of his house. He ought, if he has a rea-

sonable opportunity, to endeavour to remove him without having recourse to the last extremity. But, the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault, but no words or singing are equivalent to an assault, nor will they authorise an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence, if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person in the heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If, in the present case, you are of opinion that the prisoners were really attacked, and that Law and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, they were perhaps justified in firing as they did; if you are of opinion that the prisoners intended to fire over and frighten, then the case is one of manslaughter, and not of self-defence. With regard to Belt, there is no evidence one way or the other, whether there was or was not any other person in the house with Meade, although there is no doubt that he was there, you are not, however, to assume, in a case where a man's life is at stake, that because a man's voice was heard, it was the voice of Belt. *Meade's case*, 1 *Lewin*, *C. C.* 184.

Proof in cases of felo de se.] It is only necessary in this place to notice the law with respect to *self-murder*, so far as it affects third persons. If one person persuade another to kill himself, and the latter do so, the party persuading is guilty of murder; and if he persuade him to take poison, which he does in the absence of the persuader, yet the latter is liable as a principal in the murder. 1 *Hale*, *P. C.* 431; 4 *Rep.* 81, *b*. The prisoner was indicted for the murder of a woman by drowning her. It appeared that they had cohabited for several months previous to the woman's death, who was with child by the prisoner. Being in a state of extreme distress, and unable to pay for their lodgings, they quitted them on the evening of the day in which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster bridge to drown themselves in the Thames. They got into a boat, and afterwards went into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water, but whether by actually throwing himself in or by accident, did not appear. He struggled and got back into the boat again, and then found that the woman was gone. He endeavoured to save her, but could not get to her, and she was drowned. In his statement before the magistrate, he said, he intended to drown himself, but dissuaded the woman from following his example. The judge told the jury, that if they believed the prisoner only intended to drown himself, and not that the woman should die with him, they should

acquit the prisoner, but if they both went to the water for the purpose of drowning themselves, each encouraging the other in the commission of a felonious act, the survivor was guilty of murder. He also told the jury, that though the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated their opinion to be, that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. On a reference to the judges, they were clear, that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of the previous agreement, he was principal in the second degree, and guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either, and the prisoner was recommended for a pardon. *Dyson's case, Russ. & Ry.* 523. The prisoner was charged with murder by giving and administering laudanum to one Emma Crips, which she swallowed, and by reason thereof died. It appeared from the prisoner's statement, and from the other evidence in the case, that he and the deceased, who had been living together as man and wife, being in great distress, agreed to poison themselves, and that they both took laudanum. The woman was found dead next morning, the prisoner having previously gone out. Patteson, J., held, on the authority of *Dyson's case, supra*, and of an older case which he cited, that if two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. The prisoner was convicted. *Alison's case*, 8 *C. & P.* 418.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, and a person who furnishes her with poison for that purpose will, if absent when she took it, be an accessary before the fact only, and as he could not have been tried as such before 7 Geo. 4, c. 64, s. 9, he is not triable for a substantive felony under that act. An accessary before the fact to self-murder was not triable at common law, because the principal could not be tried, nor is he now triable under 7 Geo. 4, c. 64, s. 9, for that section does not make accessaries triable except in cases in which they might have been tried before. *Russell's case*, 1 *Moo. C. C.* 356; *S. P. Leddington's case*, 9 *Carr. & P.* 79.

Accessaries.] The punishment of accessaries in cases of murder has already been stated; see *ante*.

Where a person is charged as an accessary after the fact, to a murder, the question for a jury is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice. *Greenacre's case*, 8 *C. & P.* 35. See *Tyler's case*, 8 *C. & P.* 616, and *Manning's case*, 2 *C. & K.* 903.

MURDER—ATTEMPT TO COMMIT—MAIMING, &c.

MURDER, ETC.—ATTEMPT TO COMMIT.

UNDER this head will be considered the evidence with regard to the several offences formerly specified in the 11th and 12th sections of the 9 Geo. 4, c. 31, and now comprised in the 7 Wm. 4 & 1 Vict. c. 85, including not only attempts to murder by poisoning, shooting, &c., but likewise attempts to maim, &c.; the offences of sending explosive substances, &c. provided against by the fifth section of that statute; and also the offences provided against by the statutes 9 & 10 Vict. c. 25, ss. 3, 4, and 14 & 15 Vict. c. 19, ss. 3, 4.

Many of the cases illustrating this head have been already stated undei the title *Murder*.

In order to bring the case within the 9 Geo. 4, c. 31, s. 12, it was necessary, under the proviso attached to that section (see *post*), that the circumstances should be such that, had death ensued, the offence would have been murder, although the intent charged and proved was only an intent to maim, &c.; but such proviso is admitted in ss. 4 and 5 of the later act (see *post*), and accordingly in the class of offences comprised therein, it will be sufficient to show that they were committed without lawful excuse, and with some one of the intents specified in such sections. See *Griffith's case*, 8 *C. & P.* 248; where, on an indictment under the fourth section of the statute for wounding with intent to disable, Alderson, B., held that it was no ground for an acquittal, that if death had ensued, the offence would

only have amounted to manslaughter. See also *Nicholl's case*, 9 *C. & P.* 267, and an *anonymous case*, 2 *Moo. C. C.* 30.

In all cases, however, within the second and third sections of the statute, the act must be done with intent to commit murder; but it is not sufficient that the offence would have amounted to murder had death ensued, the jury must be satisfied that the prisoner had a positive intention to commit murder. See *Cruse's case*, 8 *C. & P.* 541, *post*, p. 768; *R.* v. *Jones*, 9 *C. & P.* 258.

As the last mentioned sections do not restrict the intent to the murder of the person stabbed, &c., as was the case in the 11th section of the 9 Geo. 4, c. 31, by the use of the words "such person," it will be an offence within such sections, if the jury find that the party stabbed or shot at A. with intent to murder B. See *Holt's case*, 7 *C. & P.* 518.

Offence at common law.] At common law an attempt to commit murder was a high misdemeanor; 1 *East, P. C.* 411.

Offences by statute.] By the 9 Geo. 4, c. 31, s. 11, if any person or persons unlawfully and maliciously should administer, or attempt to administer to any person, or should cause to be taken by any person, any poison, or other destructive thing, or should unlawfully and maliciously attempt to drown, suffocate, or strangle any person; or should unlawfully and maliciously shoot at any person, or should, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or should unlawfully and maliciously stab or wound any person, with intent in any of the cases aforesaid to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, should suffer death as a felon.

By s. 12, it was enacted, that if any person unlawfully and maliciously should shoot at any person, or should by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person; or should unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person; or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they might respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender, should be guilty of felony; and being convicted thereof, should suffer death as a felon: provided always, that in case it should appear on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or attempting to discharge loaded arms, or of stabbing, cutting, or wounding, as aforesaid, were committed under such circumstances, that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted should be acquitted of the crime of felony.

Now by the 1 Vict. c. 85 (E. & I.), the foregoing sections of the 9 Geo. 4, c. 31, are repealed, except as to offences committed before or upon the 30th of September, 1837.

By s. 2 of the 1 Vict. c. 85, "whosoever shall administer to, or cause to be taken by any person, any poison or other

destructive thing, or shall stab, cut, or wound any person, or shall, by any means whatsoever, cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof, shall suffer death.

By s. 3, "whosoever shall attempt to administer to any person any poison, or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 4, "whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 5, "whosoever shall unlawfully and maliciously send or deliver to, or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon, or otherwise apply to, any person any corrosive fluid or other destructive matter, with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, and whereby, in any of the cases aforesaid, any person shall be burnt, maimed, disfigured, or disabled, or receive some other grievous bodily harm, shall be guilty of felony; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 7, principals in the second degree, and accessaries before the fact, are punishable with death or otherwise in the same manner as a principal felon and accessaries after the fact, with imprisonment not exceeding two years.

Sect. 8 authorises the court in cases of imprisonment to award hard labour and solitary confinement.

By s. 11, parties indicted for any of the offences mentioned in the act, or for any felony whatever, where the crime charged shall include an assault, may be found guilty of an assault. This sect. is now repealed by 14 & 15 Vict. c. 100, s. 10. The 14 & 15 Vict. c. 19, s. 5, however, enacts that, "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such

indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding." See, 14 & 15 Vict. c. 19, s. 4, *ante*, 286.

Four classes of cases are comprehended within the 1 Vict. c. 85. 1. Administering poison; stabbing, cutting, or wounding; or otherwise causing bodily injury dangerous to life; with intent, in any of such cases, to commit murder. 2. Attempting to administer poison; shooting at or attempting to discharge loaded arms; or attempting to drown, suffocate, or strangle; with intent, in any such cases, to commit murder, although no bodily injury shall be effected. 3. Shooting at or attempting to discharge loaded arms; or stabbing, cutting, or wounding; with intent, in any of such cases, to maim, disfigure, or disable, or do some grievous bodily harm, or to prevent the lawful apprehension or detainer of any person. Sending explosive substances; or throwing any corrosive fluid or other destructive matter; with intent, in any of such cases, to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm, and whereby any person shall be burnt, &c., or receive some other grievous bodily harm.

Where the prisoner was indicted, under ss. 2 & 4, of the above statute, for stabbing and cutting with intent to murder, and for stabbing and cutting with intent to main, &c.; Lord Denman, C. J., and Park, J., held, that the offences might be included in the same indictment, although the judgment differed, being capital on the first count, and not on the others; and that the prosecutor could not be compelled to elect, on which charge he would proceed. *Strange's case*, 8 *C. & P.* 172.

An indictment under the 1 Vict, c. 85, s. 5, need not specify the bodily injury dangerous to life; it is enough to specify the means. *Reg.* v. *Cruse et ux.* 2 *Moo. C. C.* 53.

Where a party having a deadly weapon lawfully in his possession in his own defence, but without having previously retreated as far as possible, cuts a person who is assaulting him, he is guilty of felony under the fourth section of this statute, if he intended grievous bodily harm. *R.* v. *Adger*, 2 *Moo. & R.* 497.

Proof of attempts to poison.] By the 9 Geo. 4, c. 31, s. 11. administering and attempting to administer poison were placed on the same footing; but by the recent act the offences are distinguished and subjected to a different punishment.

Under Lord Ellenborough's act, 43 Geo. 3, c. 48, s. 1, (which did not contain the words *attempt to administer*), it was held that to constitute the offence of *administering poison*, some of the poison must be taken into the stomach. See *Cadman's case, ante*, p. 250.

Where a servant put poison into a coffee-pot, and when her mistress came down to breakfast, told her that she had put the coffee-pot there for her, and the mistress drank of the poisoned coffee. Upon an indictment for "administering and causing to be administered" the poison, Park, J., ruled, that it was not necessary in order to constitute an "administering," that there should be a delivery by the hand, and that this was "a causing to be taken," within the 9 Geo. 4. *Harley's case*, 4 *C. & P.* 369. So where the prisoner knowingly gave poison to A. to administer as a medicine to B., and it was accidentally given

to B. by a child, the judges held this to be an administering by the prisoner. *R.* v. *Michael*, 2 *Moo. C. C.* 120; 9 *C. & P.* 356. Where A. sent poison, intending it for B., with intent to kill B., and it came into the possession of C., who took it but did not die, Gurney, B., held this to be an administering within the same statute. *R.* v. *Lewis*, 6 *C. & P.* 161.

But where the indictment was for causing poison to be taken by A. B. with intent to murder A. B., and the evidence was, that the poison, though taken by A. B., was intended for another person, and the prisoner was convicted; Parke, B., afterwards said that he had spoken to Alderson, B., and that they both much doubted whether the verdict could be supported, the intent not being proved as laid. Parke, B., after referring to the foregoing case, and questioning the propriety of the decision, ordered a fresh indictment to be preferred, alleging the intent in the words of the 1 Vict. c. 85, s. 2, to have been "to commit murder," generally, under which the prisoner was tried and convicted. *R.* v. *Mary Ann Ryan*, 2 *Moo. & R.* 213.

The delivery of poison to an agent, with directions to him to cause it to be administered to another under such circumstances that if administered, the agent would be the sole principal felon, is not an "attempt to administer poison," within the 1 Vict. c. 85, s. 3. *R.* v. *Williams*, 1 *C. & K.* 589; 1 *Den. C. C.* 39.

The indictment must allege the thing administered to be poisonous or destructive; and, therefore, an indictment for administering sponge cut into small pieces and mixed with milk, with intent to poison, not alleging the sponge to be poisonous or destructive, was held by Alderson, J., to be bad. *Powell's case*, 4 *C. & P.* 571. In an indictment for murder, the prisoner was charged with administering "a certain deadly poison." It was held that the word "deadly" might be regarded as surplusage, and that it would be sufficient to show that the substance administered was capable of destroying life, without showing it to be what is usually called deadly. *Haydon's case*, 1 *Cox, C. C.* 184.

Administering unbroken cocculus indicus berries to an infant, was held to be administering poison, although it was proved that the berries were not poisonous till the exterior or pod was broken, and that by reason of the weakness of the infant's digestive organs, the berries were innocuous. Wilde, C. J., in giving judgment said, "It is admitted that the kernel is poison though not the pod; part of the berry is therefore admitted to be poison though not the whole. The whole berry was administered and with intent to kill. The act therefore of administering poison with intent to kill is proved. The effect of that act is beside the question; the act was an administering of poison which failed to produce the intended effect." *Cluderay's case*, 1 *Den. C. C. R.* 515; *S. C.* 19, and *J. M. C.* 119.

Proof of attempts to drown, &c.] A similar enactment to that contained in the 9 Geo. 4, c. 31, occurs in the 10 Geo. 4, c. 38, relating to Scotland, and upon this it has been observed, that the clause regarding attempts to suffocate, strangle, or drown, requires only the application of personal violence, with the intent to murder, &c., and does not also require a serious injury to the person. It will be sufficient, therefore, if the accused have laid hold of another, and attempted to throw him into a draw-well, or deep river, or has striven to strangle or suffocate him, although no lasting injury has resulted from the attempt. *Alison's Prin. Crim. Law of Scotl.* 171.

The prisoner was indicted under the 9 Geo. 4, c. 31, s. 11, for an attempt to drown two boys. There was a disputed right of ferry over the river Ouse. Two little boys having succeeded in punting a boat from the opposite shore, were attempting to land. The prisoner attacked the boat with his boat-hook, in order to prevent them, and by means of the holes which he made in it, caused the boat to fill with water, and then pushed it away from the shore, whereby the boys were in peril of being drowned. It appeared, however, that the prisoner, if he had wished it, might have easily got into the boat, and thrown the boys into the water, instead of which, he confined his attack to the boat itself, as if to prevent their landing, but apparently regardless of the consequences which might ensue from the means employed. Coltman, J., stopped the case, being of opinion that an assault, in fact, upon the boys ought to have been proved: seeing that the prisoner had the opportunity of attacking them personally, which he did not do, and the means, by which he attacked the boat, indicating an intention rather to prevent their landing, than to do them any injury. *Sinclair's case*, 2 *Lew. C. C.* 49.

Proof of shooting, &c. with intent to murder, &c.] Under Lord Ellenborough's act, the words of which were substantially the same as those of the 9 Geo. 4, c. 31, and of the recent statute, it was ruled, that firing at a person with a gun loaded with paper and powder only, might be within the statute. In a case of this kind, Le Blanc, J., directed the jury, that though the pistol was loaded with gunpowder and paper only, if the prisoner fired it so near to the person of the prosecutrix, and in such a direction that it would probably kill her, or do her some grievous bodily harm, and with intent that it should do so, the case was within the statute; but he desired them, in case they found the prisoner guilty, to say whether they were satisfied that the pistol was loaded with any destructive material besides gunpowder and paper or not. The jury found the prisoner guilty, and said they were satisfied that the pistol was loaded with some other destructive material. The prisoner being convicted, the judges, on a case reserved, held the conviction right. *Kitchen's case*, *Russ. & Ry.* 95. Upon an indictment under the same statute, for priming and levelling a blunderbuss, loaded with gunpowder and leaden shot, and attempting, by drawing the trigger, to discharge the same, with intent to murder, the jury found that the blunderbuss was not primed when the prisoner drew the trigger, but found the prisoner guilty. On a case reserved, a majority of the judges considered the verdict of the jury as equivalent to finding by them, that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn, and if such were the case, they were of opinion in point of law, that it was not loaded within the meaning of the statute. *Carr's case*, *Russ. & Ry.* 377. So upon an indictment under the 9 Geo. 4, c. 31, for attempting to discharge a loaded pistol, by drawing the trigger, with intent, &c., the defence was, that the touch-hole was plugged: Patteson, J., said to the jury: "If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms within the meaning of the act." *Harris's case*, 5 *C. & P.* 159. A rifle, which is loaded, but which, for want of priming, will not go off, is not a *loaded arm* within the third section; and the pointing a rifle thus circumstanced at a person, and

pulling the trigger of it, whereby the cock and hammer were thrown, and the pan opened, will not warrant a conviction, under the third section. *R.* v. *James*, 1 *C. & K.* 530. Where the indictment alleges that the pistol was loaded with powder and a leaden bullet, it must appear that it was loaded with a bullet, or the prisoner will be acquitted. *Hughes's case*, 5 *C. & P.* 126; and see *Whitley's case*, 1 *Lewin*, *C. C.* 123.

Where the prisoner, by snapping a percussion-cap, discharged a gun-barrel, detached from the stock; Patteson, J., held this to be "shooting at" with "loaded arms," within the 9 Geo. 4, c. 31, and after consulting several of the judges, refused to reserve the point. *Coates's case*, 6 *C. & P.* 394. Where the prisoner fired into a room in which he supposed the prosecutor to be, but in point of fact he was in another part of his house where he could not by possibility be reached by the shot; Gurney, B., held that the indictment could not be supported. *Lovell's case*, 2 *Moo. & R.* 30. An indictment for maliciously shooting at A. B. is supported, if he be struck by the shot, though the gun be aimed at a different person. *R.* v. *Jarvis*, 2 *Moo. & R.* 40. In *Lallement's case*, 6 *Cox. C. C.* 204, the prisoner was indicted for feloniously shooting at a person unknown with intent to murder him. The evidence for the prosecution was to the effect that the prisoner being irritated by a crowd of boys who were following him, discharged a loaded pistol among them, and thereby wounded a person who was passing along the street. There was nothing to show any intent on the part of the prisoner to shoot at any particular person, nor was the individual injured one of those who were teasing. Jervis, C. J., held that the charge contained in the indictment was not proved, and the prisoner was acquitted.

Some act must be done to prove an attempt to discharge fire-arms. Merely presenting them is not sufficient. *R.* v. *Lewis*, 9 *C. & P.* 523. If a person, intending to shoot another, put his finger on the trigger of a loaded fire-arm, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms within the statute. *R.* v. *St George*, 9 *C. & P.* 483.

Proof of stabbing or cutting.] Lord Ellenborough's act 43 Geo. 3, c. 58, did not contain, like the latter statute, the word *wound* in the corresponding enactment. The words are all intended to express a different mode of inflicting the injury. Thus where the prisoner was indicted under 43 Geo. 3, for *striking and cutting* with a bayonet, and the surgeon stated that the wound was a *punctured* triangular one, the prisoner being convicted, the judges, on a case reserved, were of opinion, that as the statute used the words in the alternative "stab" or "cut" so as to distinguish between them, the distinction must be attended to in the indictment, and they held the conviction wrong. *M'Dermot's case*, *Russ. & Ry.* 356. A striking over the face with the sharp or claw end of a hammer, producing the wound or cut, was held to be a *cutting* within the same statute. *Atkinson's case*, *Ibid.* 104. It is not necessary, in order to render the injury a *cutting*, that it should be effected with an instrument adapted for the purpose of cutting, and therefore, where it was inflicted with an iron adapted for the purpose of forcing open doors, drawers, chests, &c., the prisoner being convicted of *cutting*, the judges held the conviction to be correct. *R.* v. *Hayward*, *Russ. & Ry.* 78.

But a blow from a square iron bar, which inflicted a contused or

lacerated wound, was held not to be a *cutting* within the act. *Adam's case, cor. Lawrence, O. B.* 1 *Russ. by Grea.* 728. So where a similar wound was given on the head by a blow with the metal scabbard of a sword, by a yeomanry man (the sword being in the scabbard at the time). *Whitfield's case, cor. Bayley, J.*, 1 *Russ. by Grea.* 728. So a blow with the handle of a windlass, though it made an incision. *Anon. cor. Dallas*, 5 *Ev. Col. Stat. part* v. p. 334, (*n*); 1 *Russ. by Grea.* 728. The authority of these latter cases may perhaps be doubted, since the decision of *Atkinson's case*, (*supra*), in which the *nature of the injury*, and not *the instrument*, appears to have been considered the proper test of decision. See 2 *Stark. Ev.* 500 (*n.*), 2*d ed.*

Proof of wounding.] Where the prisoner is indicted for *wounding*, it must appear that the skin was broken, a mere contusion is not sufficient. Where the prisoner had struck the prosecutor with a *bludgeon*, and the skin was broken, and blood flowed; Patteson, J., said, that it was not material what the instrument used was, and held the case to be within the statute. *Payne's case*, 4 *C. & P.* 558. In a case which occurred before Littledale, J., on the Oxford circuit, he directed a prisoner to be acquitted, it not appearing that the skin was broken or incised. *Anon. cited* 1 *Moo. C. C.* 280. See *Moriarty* v. *Brooks*, 6 *C. & P.* 684. But in a case which came soon afterwards before Parke, J., where there was no proof of an incised wound, the learned judge told the jury that he was clearly of opinion that it need not be an incised wound, for that he believed the act of parliament (9 Geo. 4,) had introduced the word *wound* for the purpose of destroying the distinction, which, as the words in the old statute were only *stab* or *cut*, it was always necessary to make, between the contused and incised wounds, and that it was not necessary, either that the skin should be broken or incised, or that a cutting instrument should be used, for that otherwise the thing intended to be remedied by the new act would remain as before. The prisoner being found guilty, the case was reserved for the decision of the judges, amongst whom there was considerable discussion and difference of opinion. Lord Tenterden said he thought the word *wound* was not introduced to cure the difficulty, whether a cutting or stabbing instrument was used. In this case, from the continuity of the skin not being broken, it was thought by all, except Bayley, B., and Parke, J., that there was no wound within the act, and that the conviction was wrong. *Wood's case*, 1 *Moo. C. C.* 278; 4 *C. & P.* 381. So a scratch is not a wound within the statute; there must at least be a division of the external surface of the body. *Per Parke, B.*, *Beckett's case*, 1 *Moo. & R.* 526. So it was held by Bosanquet, Coleridge, and Coltman, JJ., that to constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle is not sufficient. *M'Loughlin's case*, 8 *C. & P.* 635. But where a blow given with a hammer broke the lower jaw in two places, and the skin was broken internally, but not externally, and there was not much blood; Lord Denman, C. J., and Parke, J., held this a wounding within the act. *R.* v. *Leon. Smith*, 8 *C. & P.* 173. Where the prisoner was indicted under the 9 Geo. 4, for cutting and wounding the prosecutor, with intent, &c., and it appeared that he threw a hammer at him, which struck him on the face, and broke the skin for an inch and a half, the prisoner being convicted, a case was reserved for the opinion of the judges, whether

the injury could be considered either as a stab, cut, or wound, within the true construction of the statute, and it was unanimously resolved by those who were present, that the case amounted to a *wound* within the statute, and that the conviction was right. *Wither's case*, 1 *Moo. C. C.* 294; 4 *C. & P.* 446. Where the prisoner struck the prosecutor on the outside of his hat with an air-gun, and the hard rim of the hat wounded the prosecutor, but the gun did not come directly in contact with head; the judges held this to be a wounding within the statute. *Sheard's case*, 7 *C. & P.* 846; *S. C.* 2 *Moo. C. C.* 13.

To support an indictment for wounding with intent to maim, &c., the wound must have been given with some instrument. Where the prisoner was indicted under the 9 Geo. 4, c. 31, s. 12, and it appeared that he had bit off the end of one of the prosecutor's fingers; a majority of the judges held the conviction for wounding with intent to maim, bad. *Stevens's case*, 1 *Moo. C. C.* 409. So Patteson, J., ruled, that biting off the end of a person's nose was not within the same statute. *Ann Harris's case*, 7 *C. & P.* 446. So where the prisoner was indicted under the 1 Vict. c. 85, s. 4, *ante*, p. 760, for wounding with intent to maim, and the evidence was, that the prisoner with his teeth had bitten off the prepuce of a child three years old; Alderson, B., held that it was not an offence within the act. *Jenning's case*, 2 *Lew. C. C.* 130. But the means or instrument by which the wound was effected need not be stated, and if stated, do not confine the prosecutor to the proof of wounding by such means. The prisoners were indicted for wounding with a stick and with their feet. The jury found them guilty, but stated that they could not tell whether the wound was caused by a blow with a stick or a kick with a shoe. On a case reserved, the judges were unanimously of opinion that the means by which the wound was inflicted need not have been stated, that it was mere surplusage to state them, and that the statement did not confine the crown to the means stated, but might be rejected as surplusage, and that whether the wound was from a blow with a stick, or a kick from a shoe, the indictment was equally supported. *Brigg's case*, 1 *Moo. C. C.* 318; 1 *Lew. C. C.* 61. So it has been held that on an indictment under the 1 Vict. c. 85, s. 4, for wounding with intent, &c., the instrument need not be stated. *Erle's case*, 2 *Lew. C. C.* 133.

The wound must have been given by the prisoner. Where the prisoner attacked the prosecutor with a butcher's knife and drawing him backwards, attempted to cut his throat, and an injury (which the prosecutor described as a slight scratch) was inflicted by the prisoner on the throat of the prosecutor; but the prosecutor succeeded in warding off further hurt, by lifting his hands, and in doing this the prosecutor said his hands struck against the knife, and were cut; Parke, B., held that as the cuts on the hands were inflicted by the prosecutor himself, in the attempt to defend himself from the prisoner's attack, they could not be considered wounds inflicted by the prisoner, with intent to murder or maim the prosecutor. *R.* v. *Beckett*, 1 *Moo. & R.* 526.

Proof of inflicting bodily injury dangerous to life.] The 1 Vict. c. 85, s. 2, among other things, makes it a capital offence if any party, "shall by any means whatsoever, cause to any person any bodily injury dangerous to life," with intent to commit murder; see *ante*.

Where a party was indicted under the above section, for inflicting an injury dangerous to life with intent to commit murder; Patteson, J., held, that the jury ought not to convict, unless they were satisfied that the prisoner had in his mind a positive intention to murder, and that it was not sufficient that it would have been a case of murder, if death had ensued. *Cruse's case*, 8 *C. & P.* 541; 2 *Moo. C. C.* 53. The indictment in the above case stated that the prisoner feloniously and of his malice aforethought, did assault C. H. and did cause unto C. H. "a certain bodily injury dangerous to the life of her the said C. H., by then and there feloniously with his hands and fists, beating and striking the said C. H. in and upon the head and back of her the said C. H., and then and there with the left foot of him the said T. C., feloniously kicking the said C. H. in and upon the back of her the said C. H., and then and there with his hands feloniously seizing and lifting the said C. H., and then and there feloniously striking the head of the said C. H. against a certain wooden beam of a certain ceiling there, and then and there feloniously with his arms and hands lifting up the said C. H., and with great force and violence casting down, flinging, and throwing the said C. H. upon and against a certain brick floor there, with intent in so doing her, the said C. H., then and there, and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder." On demurrer to the indictment, on the ground that it did not state what bodily injury had been inflicted; the judges held that the description of the means in the indictment necessarily involved the nature and situation of the bodily injury, and that the indictment was therefore good, even assuming that it was necessary to state the nature and situation of the injury. See this case on another point; *post, title Coercion by husband.*

Proof of sending explosive substances; or throwing corrosive fluids, &c.] Sending a tin-box filled with gunpowder and peas to the prosecutor, so contrived that the prosecutor should set fire to the powder by opening the box, was held by the judges not to be an attempt to discharge loaded arms within the 9 Geo. 4, c. 31, s. 11. *Mountford's case*, 1 *Moo. C. C.* 441. So throwing vitriol in the face of the prosecutor was likewise held not to be a wounding within the 12th section of the same statute. *Murrow's case, Id.* 456.

These cases led to the enactment of the 1 Vict. c. 85, s. 5, *ante*, p. 760.

In order to convict the prisoner under the above section, the intent to burn, &c., or do some bodily harm, must not only be proved, but it must be shown that some person was actually injured. Should it clearly appear that the intent of a party throwing any corrosive fluid at another, was to burn the clothes of the latter, the case would seem not to be within the statute. See *Williams's case*, 1 *East, P. C.* 424, *ante*, p. 289. Boiling water is "destructive matter" within the above section, *R.* v. *Violet Crawford*, 1 *Den. C. C.* 100.

And now it is provided by the 9 & 10 Vict. c. 25, s. 3, "that whoever shall unlawfully and maliciously, by the explosion of gunpowder, or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony."

By s. 4, "That whoever shall unlawfully and maliciously cause any gunpowder, or other explosive substance, to explode, or send or deliver to, or cause to be taken or received, by any person, any explosive substance, or any other dangerous or noxious thing, or cast

or throw at or upon, or otherwise apply to any person any corrosive fluid, or other destructive or explosive substance, with intent, in any of the cases aforesaid, to burn, maim, disfigure, or disable any person, shall, although no bodily injury be effected, be guilty of felony."

By s. 5, "That whoever shall be convicted of any felony, hereinbefore mentioned, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any period not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Proof of the intent in general.] The intent must be proved as laid. Thus, where the prisoner was charged with cutting, &c., with intent to murder, maim, and disable, and the jury found that the intent was to commit a robbery, and that the prisoner cut and maimed the watchman, with intent to disable him, till *he could effect his own escape;* the prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was wrong, for, by the finding of the jury, the prisoner intended only to produce a temporary disability, till he could escape, and not a permanent one. *Boyce's case*, 1 *Moo. C. C.* 29. But where the prisoner was charged with shooting, with intent to do A. B. some grievous bodily harm, and the jury found that the prisoner's motive was to prevent his lawful apprehension, but that in order to effect that purpose, he had also the intention of doing A. B. some grievous bodily harm; the prisoner being convicted, the judges held that if both the intents existed, it was immaterial which was the principal and which the subordinate, and that the conviction was right. *Gillow's case*, 1 *Moo. C. C.* 85; and see *Williams's case*, 1 *Leach*, 533, *ante*, p. 289.

If a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with intent to do grievous bodily harm. *R.* v. *Bowen*, *Carr. & M.* 149. In this case, it was also held that even if the prisoner's was not the hand that inflicted the wound, he ought to be convicted on this indictment, if the jury were satisfied that he was one of two persons engaged in the common purpose of robbing the prosecutor, and that the other person's was the hand that inflicted the wound. So where upon an indictment for shooting at H. with intent to murder H., it appeared that the prisoner intended to shoot at and kill L., but shot at H. by mistake; Littledale, J., left it to the jury to say, whether the prisoner intended to murder H., and upon their finding that he shot at H., intending to murder L., directed an acquittal. *R.* v. *Holt*, 7 *C. & P.* 518; see *R.* v. *Mary Anne Ryan*, *ante*, p. 763.

In estimating the prisoner's real intentions, says Mr. Starkie, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does. If with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention were to destroy. It is not, however, essential to the drawing such an inference that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple

and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal, provided the criminal intention can be inferred from other circumstances. 2 *Stark, Ev.* 503, *2nd ed.*, citing *R.* v. *Case, coram* Park, J., who said that it had been so held by the judges.

Where the question is whether the shooting was by accident or design, evidence that the prisoner at another time maliciously shot at the prosecutor, is admissible. *Voke's case, Russ.* & *Ry.* 531, stated, *ante*, p. 92. So in the case of poisoning, evidence of former as well as of subsequent attempts of a similar kind, may be received. 2 *Stark, Ev.* 501, *2nd ed.*

If proof of the intent fails, but there is sufficient evidence that the cutting, stabbing, or wounding, was unlawful, the prisoner may be convicted under the 5th section of the 14 & 15 Vict., c. 19, which enacts, that "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound, any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding." For the punishment for that offence, see 14 & 15 Vict. c. 19, s. 4, *ante*, p. 286.

Proof of the intent to murder.] It is not sufficient that the offence would have been murder, had death ensued; in order to bring the case within the statute, the jury must be satisfied that the prisoner had a positive intention to commit murder. See *Cruse's case, ante*, p. 768.

By the 7 W. 4 & 1 Vict. c. 85, s. 11, on the trial for any felony, where the crime charged included an assault, it was lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault; but owing to the difficulties in practice, which were occasioned by this provision, the section has been repealed by the 14 & 15 Vict., c. 100, s. 10; see *ante*, p. 285.

Proof of the intent to maim, disfigure, or disable.] A maim, at common law, is such a bodily hurt as renders a man less able in fighting to defend himself, or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal ability, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or fore tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his nose or ears is not so at common law. 1 *East, P. C.* 393; *Sullivan's case, Carr.* & *M.* 309.

Though the primary intent of the offender be of a higher and more atrocious nature, *viz.*, to murder, and in that attempt he does not kill, but only maims the party, it is an offence within the 4th section of the statute; for it is a known rule of law, that if a man intend to commit one kind of felony, and in the

prosecution of that commit another, the law will connect his felonious intention with the felony actually committed, though different in species from that he originally intended. 1 *East, P. C.* 400.

The following case was decided upon the Coventry act, 21 & 22 Car. 2, c. 1, (repealed by 9 Geo. 4, c. 31,) which, like the 9 Geo. 4, and the recent act, contain the words, "with intent to maim or disfigure." The prisoners were indicted for slitting the prosecutor's nose, with intent to maim him. In their defence they insisted that their intent was to murder him, and not to maim him; and that, therefore, they were not within the statute; but Lord King said, that the intention was a matter of fact to be collected from all the circumstances of the case, and as such was proper to be left to the jury; and that if it were the intention of the prisoners to murder, it was to be considered whether the means made use of to accomplish that end, and the consequences of those means, were not likewise in their intention and design; and whether every blow and cut were not intended, as well as the object for which the prisoners insisted they were given. The prisoners were found guilty. Upon this case, Mr. Justice Yates has observed, that it seemed to him that the whole aim of this defence, allowing the intention to be what the prisoners contended, was insufficient, and that an intention more criminal and malignant could not excuse them from one which was less so. On the conference, however, of the judges in *Carroll's case*, Willes, J., and Eyre, B., expressed some dissatisfaction with this case, and thought, at least, the construction ought not to be carried further. *Coke's case*, 1 *East, P. C.* 400; 6 *St. Tr.* 212, 2219, 22, 228. See *Cox's case, post*, p. 772.

To *disable*, signifies the infliction of a permanent disability; therefore, where the indictment charges an intent to disable, and it appears that the prisoner only intended to disable the party till he could effect his own escape, it is not within that part of the statute. *Boyce's case*, 1 *Moo. C. C.* 29.

Proof of the intent to do some grievous bodily harm.] It is not necessary either to prove malice in the prisoner against the person injured, or that any grievous bodily harm was in fact inflicted; all that is necessary, is to prove the stabbing, cutting, or wounding, and the *intent* required by the statute. The prisoner having been apprehended by one Headley, in an attempt to break open his stable in the night, was taken into Headley's house, where he threatened him with vengeance, and endeavoured to carry his threats into execution with a knife, which lay before him; in so doing he cut the prosecutor, one of Headley's servants, who, with Headley, was trying to take away the knife. The jury, who found the prisoner guilty, said that the thrust was made with intent to do grievous bodily harm to any body upon whom it might alight, though the particular cut was not calculated to do so. Upon the case being submitted to the consideration of the judges, they were of opinion, that general malice was sufficient under the statute, without particular malice against the person cut; and that if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done. *Hunt's case*, 1 *Moo. C. C.* 93. This case appears to have resolved the doubts expressed by Mr. Justice Bayley, in a case previously tried before him. *Akenhead's case, Holt, N. P. C.* 469. The same construction, with regard to general malice, was put upon the

Coventry act. See *Carroll's case*, 1 *East*, *P. C.* 394, 396. See also *R.* v. *Adger*, *ante*, p. 762.

Where the prisoner, in attempting to commit a robbery, threw down the prosecutor, kicked him, and produced blood; Denman, C.J., left it to the jury to say, whether his intent was to *disable* the prosecutor, or to do him some grievous bodily harm; adding that nothing was more likely to accomplish the robbery which he had in view, than the disabling which such violence would produce. *Shadbolt's case*, 5 *C. & P.* 504.

The intent to do grievous bodily harm will be proved, although the prisoner had also an intent to commit another felony. Thus where, on an indictment, charging the prisoner with cutting M. E., with intent to do her some grievous bodily harm, it appeared that the prisoner cut the private parts of a girl, ten years of age, Graham, B., told the jury, that they were to consider whether this was not a grievous bodily injury to the child, though eventually not dangerous. As to the intent, though it probably was the prisoner's intention to commit a rape, yet, if to effect the rape, he did that which the law makes a distinct crime, *viz.* intentionally did the child a grievous bodily harm, he was not the less guilty of that crime, because his principal object was another. He added, that the intention of the prisoner might be inferred from the act. The jury found the prisoner guilty, and on a case reserved, the judges held the conviction right. *Cox's case, Russ. & Ry.* 362; and see *Gillow's case*, 1 *Moo. C. C.* 85.

A constable was employed to guard a copse from which wood had been stolen, and for this purpose carried a loaded gun; from this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop; the prosecutor, however, running away, the constable, having no other means of bringing him to justice, fired and wounded him in the leg. It appeared that the constable was not aware at the time that any felony had been committed by the prosecutor. The constable having been convicted upon an indictment charging him with assaulting the prosecutor with intent to do him grievous bodily harm, the Court of Criminal Appeal held that the conviction was right, upon the ground that "the fact that the prosecutor was committing a felony was not known at the time; he was therefore liable to be convicted, though the amount of punishment might deserve great consideration." *Dadson's case*, 2 *Den. C. C. R.* 35; *S. C.* 20 *L. J. M. C.* 57.

Proof of intent—to prevent lawful apprehension or detainer.] The statute only makes it an offence when the injury is done to prevent a *lawful* apprehension or detainer; and therefore, the prosecutor must show that the arrest, or intended arrest, was legal. *Duffin's case*, *Russ. & Ry.* 365. The prisoner having previously cut a person on the cheek, and several others, who were not present when the transaction took place, went to apprehend him without any warrant, and on their attempting to take him into custody, he stabbed one of them. Le Blanc, J., was of opinion that the prosecution could not be sustained. He said that, to constitute an offence within this branch of the statute, there must be a resistance to a person having lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence was committed, or must be armed with a warrant. (*Vide ante*, p. 730.) This branch of the statute was intended to protect officers and others armed with authority, in

the apprehension of persons guilty of robberies or other felonies. *Dyson's case*, 1 *Stark. N. P.* 246.

In order to render a party guilty of the offence of wounding, &c., with intent to prevent his lawful apprehension, it must appear that he had notice of the authority of the officer; for, if he had no such notice, and death had ensued, it would only be manslaughter. *Ante*, p. 739. Some wheat having been stolen was concealed in a bag in a hedge. The prisoner and another man came into the field and took up the bag. They were pursued by the prosecutor, who seized the prisoner without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before the prosecutor had spoken, the prisoner drew a knife and cut him across the throat. On an indictment for cutting, with intent to prevent apprehension, Lawrence, J., said, as the prosecutor did not communicate to the prisoner the purpose for which he seized him, the case does not come within the statute. If death had ensued, it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion. The prisoner must be acquitted on this indictment. *Rickett's case*, 3 *Campb.* 68; and see *ante*, p. 740. But where, in a case somewhat similar to the preceding, the goods had been concealed by the thief in an out-house, and the owner, together with a special constable under the watch and ward act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night, and *removed* the goods from the place where they were deposited, and upon an attempt to apprehend them the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice "Stop thief!" and on being overtaken the prisoner drew a knife, with which he cut the hands of the prosecutor, and made several attempts to cut his throat, the prisoner was convicted and executed. *Robinson's case, cor. Wood, B.*, 2 *Stark. Ev.* 501, (*n.*) 2*nd ed.*; and see *ante*, p. 740, as to notification of an officer's character, &c.

Where a police constable, on being sent for at a late hour of the night to clear a beer house, did so, and told one of the persons on leaving the house to go away, who refused and used threatening language, and cut the constable with a knife; Williams, J., held that the constable was justified in laying hands on the party to remove him. The prisoner, who was indicted for cutting with intent, &c., was found guilty. *Hems's case*, 7 *C. & P.* 312.

The prisoner was indicted for cutting, &c., with intent to murder, and also with intent to do grievous bodily harm. It appeared that a constable having a warrant to arrest the prisoner, gave it to his son, who, in attempting to take the prisoner into custody, was stabbed by him with a knife which he happened to have in his hand at the time, the constable then being in sight but a quarter of a mile off; Parke, B., held that the arrest was illegal, and that the prisoner must be acquitted. *Patience's case*, 7 *C. & P.* 775.

The prisoner asked permission at the house of the prosecutor to take some ashes, which he was allowed to do, but as he was coming out the prosecutor's apprentice saw a copper tea-kettle among the ashes in the prisoner's basket, and told the prosecutor. The latter laid hold of the prisoner to secure him on the charge of stealing the tea-kettle, and in the scuffle both fell, when the prisoner cut the prosecutor with a knife. Alderson, B., held this to be a wounding within the statute, provided the jury were satisfied that the prisoner had stolen the kettle, as the

prosecutor then had a right to apprehend him. *Price's case*, 8 *C. & P.* 282.

A police officer having been assaulted by the prisoner attempted two hours afterwards to take him into custody, but the prisoner resisted and wounded the constable. It was held by the Court of Criminal Appeal that the attempted apprehension was unlawful, and that the prisoner could not be convicted of wounding with intent to prevent his lawful apprehension. *Walker's case*, 1 *Dears. C. C. R.* 358; *S. C.* 23 *L. J. M. C.* 123.

Proof of the intent—principals—aiding and abetting.] Where several persons are engaged in the commission of a felony, and one of them commits an offence within the statute, a question arises how far the others are to be considered as sharing in his guilt. Where three persons, engaged in committing a felony, were surprised by the watchman, and two of them made their escape, and the third *afterwards*, in attempting to make his escape in a different direction, cut the watchman; upon an indictment, charging both him and one of the other prisoners (Richardson), with an offence under the 43 Geo. 3, Graham, B., directed the jury, that if the prisoners came with the same illegal purpose, and both determined to resist, the act of one would fix guilt upon both, and that it might have been part of the plan to take different ways. The prisoners were found guilty; but on a case reserved, the judges were of opinion that there was no evidence against Richardson. *White's case*, *Russ. & Ry.* 99.

Two private watchmen, seeing the prisoner and another person with their carts loaded with apples, went to them, intending, as soon as they could get assistance, to secure them; one walking at the side of each of the men. The other man wounded the watchman near him. The prisoner being indicted for this offence, under the 9 Geo. 4, it was held that the jury must be satisfied that he and the other man had not only gone out with a common purpose of stealing apples, but also of resisting with violence any attempt to apprehend them. *Collison's case*, 4 *C. & P.* 565.

It is not necessary, in order to convict the prisoner, that he should appear to be the person who actually fired the shot. In an indictment, on the 43 Geo. 3, the three first counts stated, in the usual form, that J. S. did shoot at A. B., and went on to state that M. and N. were present aiding and abetting. The three last counts stated that an unknown person did shoot at A. B., &c., and that J. S. and M. N. were present aiding and abetting the said unknown person in the felony aforesaid, to do and commit, and were then and there knowing of and privy to the commission of the said felony, against the statute, &c.; but they omitted to charge them with being feloniously present, &c. There was no evidence to show that J. S. was the person who fired. It was objected that the prisoners could not be convicted on the first set of counts, because the jury had negatived the firing by J. S.; nor on the second set, because the word, "feloniously" was omitted. Graham, B., said that the objection was founded upon a supposed difference in the act of shooting, &c., and the being present, &c., at it; whereas the act of parliament had made no degrees, no difference of offence, and that the plain meaning and necessary construction of the act was, that if the parties were present, knowing, &c., they and every one of them shot, and that the charge of *feloniously* shooting applied to every one of them. The prisoners being convicted, all the judges thought that the conviction was

right. *Towle's case, Russ. & Ry.* 314. See *Bowen's case, ante,* p. 769.

Where A. was charged under the 1 Vict. c. 85, s. 2, with inflicting an injury dangerous to life, with intent to murder, and B. was charged with aiding and abetting him; Patteson, J., held that it was essential, in order to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder. *Cruse's case,* 8 *C. & P.* 541.

Impeding persons endeavouring to escape from wrecks.] The present seems to be the most appropriate head under which to place the following provision.

By the 1 Vict. c. 89, s. 7 (E. & I.), "whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, whether he shall be on board or shall have quitted the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By the Irish statute, the 10 Geo. 4, c. 34, s. 8, "all persons conspiring, confederating, and agreeing to murder any person shall be guilty of felony, and being convicted thereof shall suffer death as felons."

By s. 9, "every person who shall solicit, encourage, persuade, or endeavour to persuade, or who shall propose to any person to murder any other person, shall be guilty of felony, and being convicted thereof shall suffer death as a felon." These clauses are peculiar to the law of Ireland. 1 *Gabbett's Crim. Law of I.,* p. 259.

Persons using chloroform in order to commit a felony.] The 14 & 15 Vict. c. 19, s. 3, enacts, "that if any person shall unlawfully apply or administer, or attempt to apply or administer, to any other person any chloroform, laudanum, or other stupifying or overpowering drug, matter, or thing with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or other person in committing any felony, every such offender shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

NUISANCE.

A PUBLIC or common nuisance is such an inconvenient or troublesome offence as annoys the whole community in general, and not merely some particular person; and therefore this is indictable. 4 *Bl. Com.* 167. It may be both indictable and actionable. *Rose* v. *Graves*, 5 *M. & Gr.* 613.

Proof of the public nature of the nuisance.] The existence of the matter as a *public* nuisance depends upon the number of persons annoyed, and is a fact to be judged of by a jury. *White's case*, 1 *Burr.* 337. Thus where a tinman was indicted for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three sets of chambers in Clifford's Inn, and that the noise might be partly excluded by shutting the windows; Lord Ellenborough ruled that the indictment could not be maintained, as the annoyance, if any thing, was a private nuisance. *Lloyd's case*, 4 *Esp.* 200. But a nuisance near the highway, whereby the air thereabouts is corrupted, is a public nuisance. *Pappineau's case*, 2 *Str.* 686.

Making great noises in the night, as with a speaking-trumpet, has been held to be an indictable offence, if done to the disturbance of the neighbourhood. *Smith's case*, 1 *Str.* 704. So keeping dogs, which make noises in the night, is said to be indictable. 2 *Chitty's Cr. Law*, 647.

So the keeping of hogs in a town is not only a nuisance by statute 2 W. & M. sess. 2, c. 8, s. 20) but also at common law. *Wigg's case*, 2 *Ld. Raym.* 1163.

Iti s now settled that the circumstance, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance; see *ante*, p. 550.

Proof of the degree of annoyance which will constitute a public nuisance.] It is a matter of some difficulty to define the degree of annoyance which is necessary to constitute a public nuisance. Upon an indictment for a nuisance, in making great quantities of offensive liquors near the king's highway, it appeared in evidence that the smell was not only intolerably offensive, but also noxious and hurtful, giving many persons headaches. It was held, that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable. *White's case*, 1 *Burr.* 333. So it is said that the carrying on of an offensive trade is indictable, where it is destructive of the health of the neighbourhood, or renders the houses untenantable or uncomfortable. *Davey's case*, 5 *Esp.* 217. So it was ruled, by Abbott, C. J., in the case of an indictment for carrying on the trade of a varnish maker, that it was not necessary that a public nuisance should be injurious to health; that if there were smells offensive to the senses, it was enough, as the neighbourhood had a right to pure and fresh air. *Neil's case*, 2 *C. & P.* 485.

Proof—with regard to situation.] A question of considerable difficulty frequently presents itself, as to the legality of carrying on an offensive trade in the neighbourhood of similar establishments, and as to the length of time legalising such a nuisance. Where the defendant set up the business of a melter of tallow in a neighbourhood where other manufactories were established, which emitted disagreeable and noxious smells, it was ruled that he was not liable to be indicted for a nuisance, unless the annoyance was much increased by the new manufactory. *B. Nevill's case*, *Peake*, 91. And it has also been ruled, that a person cannot be indicted for *continuing* a noxious trade which has been carried on in the same place for nearly fifty years. *S. Neville's case*, *Peake*, 93. But upon this case it has been observed, that it seems hardly reconcileable with the doctrine, that no length of time can legalise a public nuisance, although it may supply an answer to an action by a private individual. 1 *Russ. by Grea.* 320; *vide post.* It should seem, continues the same writer, that, in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. With regard to offensive works, though they may have been originally established under circumstances which would *primâ facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements which would make them less offensive, may be indictable. 1 *Russ. by Grea.* 320.

Upon an indictment for carrying on the business of a horse-boiler, it appeared that the trade had been carried on for many years before the defendants came to the premises; but its extent was much greater under them. For the defendants, it was shown that the neighbour-

hood was full of horse-boilers and other noxious trades, and evidence was given of the trade being carried on in an improved manner. Lord Tenterden observing, that there was no doubt that this trade was in its nature a nuisance, said, that, considering the manner in which the neighbourhood had always been occupied, it would not be a nuisance, unless it occasioned more inconvenience as it was carried on by the defendants than it had done before. He left it, therefore, to the jury to say whether there was any increase of the nuisance; if, in consequence of the alleged improvements in the mode of conducting the business, there was no increase of annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance, and the defendants must be convicted. *Watt's case, Moo. & Mal. N. P. C.* 281.

If a noxious trade is already established in a place, remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it, that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases, the party is entitled to continue his trade, because it was legal before the erecting of the houses in the one case, and the making of the road in the other. *Per Abbott, C. J., Cross's case,* 2 *C. & P.* 483.

Proof—with regard to length of time.] No length of time will legitimate a nuisance; and it is immaterial how long the practice has prevailed. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of long standing. *Weld* v. *Hornby,* 7 *East,* 199. Thus upon an indictment for continuing a stell fishery across the river at Carlisle, though it appeared that it had been established for a vast number of years, yet Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated. *Case* cited by *Lord Ellenborough,* 3 *Campb.* 227. So it is a public nuisance to place a woodstack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. *Fowler* v. *Sanders, Cro. Jac.* 446. In one case, however, Lord Ellenborough ruled, that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used as a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. Under these circumstances, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that it was such a fair or market legally instituted. *Smith's case,* 4 *Esp.* 111.

Proof of particular nuisances—particular trades.] Certain trades, producing noxious and offensive smells, have been held to be nuisances, when carried on in a populous neighbourhood, as making candles in a town by boiling stinking stuff, which annoys the whole neighbourhood with stenches. *Tohayle's case, cited Cro. Car.* 510; but see 2 *Roll. Ab.* 139; *Hawk. P. C. b.* 1, *c.* 75, *s.* 10. And it seems that a brewhouse erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may

be indicted as a common nuisance; and so in the case of a glass-house or swine-yard. *Hawk. P. C. b.* 1, *c.* 75, *s.* 10; *Wigg's case*, 2 *Lord Raym.* 1163. So a manufactory for making spirit of sulphur, vitriol, and aqua fortis, has been held indictable. *White's case*, 1 *Burr.* 333. So a tannery where skins are steeped in water, by which the neighbouring air is corrupted. *Pappineau's case*, 2 *Str.* 686.

Proof of particular nuisances—corrupting the waters of public rivers.] In *Medley's case*, 6 *C. & P.* 292, the chairman, deputy-chairman, superintendent, and engineer of the Equitable Gas Company were found guilty on an indictment for conveying the refuse of gas into the Thames, whereby the fish were destroyed, and the water was rendered unfit for drink, &c. Lord Denman, C. J., told the jury, that the question for them was, whether the special acts of the company amounted to a nuisance.

Proof of particular nuisances—railways—steam-engines, &c.] Where an act of parliament gave a company power to make a railway, and another act gave unqualified power to use locomotive steam-engines on the railway, and the railway was constructed in some parts within five yards of a highway; upon an indictment for a nuisance, stating that horses passing along the highway were terrified by the engines, it was held that this interference with the rights of the public must be presumed to have been sanctioned by the legislature, and that the benefit derived by the public from the railway showed that there was nothing unreasonable in the act of parliament giving the powers. *Pease's case*, 4 *B. & Ad.* 30. See *post*, title *Railways.* But where the defendant, the proprietor of a colliery, without the authority of an act of parliament, made a railway from his colliery to a sea-port town, upon the turnpike way, which it narrowed in some places, so that there was not room for two carriages to pass, although he gave the public (paying a toll) the use of the railway, yet it was held that the facility thereby afforded to traffic was not such a convenience as justified the obstruction of the highway. *Morris's case*, 1 *B. & Ad.* 441.

The proceedings in indictments for nuisances by steam-engines are regulated by the 1 & 2 Geo. 4, c. 41, (U. K.) By sec. 1, the court by which judgment ought to be pronounced in case of a conviction upon any such indictment (*viz.* for a nuisance arising from the improper construction or negligent use of furnaces employed in the working of steam-engines), is authorised to award such costs as shall be deemed proper and reasonable to the prosecutor, such award to be made before or at the time of pronouncing final judgment. And by the second section, if it shall appear to the court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful, without the consent of the prosecutor, to make such order touching the premises as shall by the court be thought expedient for preventing the nuisance in future, before passing final sentence. By the third section the act is not to extend to furnaces erected for the purposes of working mines.

Proof of particular nuisances—acts tending to produce public disorder—acts of public indecency.] Common stages for rope dancers, and common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, to the inconvenience of the neighbourhood. *Hawk. P. C. b.* 1, *c.* 75, *s.* 6.

So collecting together a number of persons in a field, for the purpose of pigeon-shooting, to the disturbance of the neighbourhood, is a public nuisance. *Moore's case*, 3 *B. & Ad.* 184; see this case more fully, *post*, p. 783.

It is upon this same principle that many of the acts after-mentioned have been held to be public nuisances.

What outrages public decency, and is injurious to public morals, is indictable as a misdemeanor. *Hawk. P. C. b.* 1, *c.* 75, *s.* 4; 1 *Russ. by Grea.* 326. Thus bathing in the open sea, where the party can be distinctly seen from the neighbouring houses, is an indictable offence, although the houses had been recently erected, and until their erection, it had been usual for men to bathe in great numbers at the place in question: "for," said M'Donald, C. B., "whatever place becomes the habitation of civilised men, there the laws of decency must be enforced." *Crunden's case*, 2 *Camp.* 89; *Sedley's case*, *Sid.* 168.

An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. *Webb's case*, 1 *Den. C. C. R.* 338; *S. C.* 18 *L. J. M. C.* 39.

The prisoner was indicted for an indecent exposure in an omnibus, several passengers being therein. The indictment contained two counts; one laid the offence as having been committed in an omnibus, and the other in a public highway. It was held that an omnibus was sufficiently a public place to sustain the indictment. *Holmes's case*, 1 *Dears. C. C. R.* 207; *S. C.* 22 *L. J. M. C.* 122.

Proof of particular nuisances—disorderly inns.] Every one, at common law, is entitled to keep a public inn, (but if it be an ale-house, he comes within the statutes concerning ale-houses;) and may be indicted and fined, as guilty of a public nuisance, if he usually harbour thieves, or suffer frequent disorders in his house, or take exorbitant prices, or refuse to receive a traveller as a guest into his house, or to find him victuals, upon the tender of a reasonable price. *Hawk. P. C. b.* 1, *c.* 78, *s.* 1, 2. *Iven's case*, 7 *C. & P.* 213; *Hawthorn* v. *Hammond*, 1 *C. & K.* 404. It is said also, that setting up a new inn, where there is already a sufficient number of ancient and well governed inns, is a nuisance. *Id.* 3 *Bac. Ab. Inns*, (A.); 1 *Russ. by Grea.* 322.

Proof of particular nuisances—gaming-houses.] In *Dixon's case*, 10 *Mod.* 336, it was held that the keeping of a gaming-house was an offence at common law as a nuisance. The keeping a common gaming-house is an indictable offence, for it not only is an encouragement to idleness, cheating, and other corrupt practices, but it tends to produce public disorder by congregating numbers of people. *Hawk. P. C. b.* 1, *c.* 75, *s.* 6; 1 *Russ. by Grea.* 323. A *feme covert* may be convicted of this offence. *Hawk. P. C. b.* 1, *c.* 92, *s.* 30. Keeping a common gaming-house, and for lucre and hire unlawfully causing and procuring divers evil disposed persons to frequent and come to play together a certain game called *rouge et noir*, and permitting the said idle and evil disposed persons to remain, playing at the said game, for divers large and excessive sums of money, is a sufficient statement of an offence indictable at common law; *Rogier's case*, 1 *B. & C.* 272; and *per Holroyd, J.*, it would have been sufficient merely to have alleged that the defendant kept a common gaming-house. *Ibid.* So in *Mason's case*, 1 *Leach*, 548, Grose, J., seemed to be of opinion that

the keeping of a common gaming-house might be described generally. See also *Taylor's case*, 3 *B. & C.* 502. It seems that the keeping of a *cockpit* is not only an indictable offence at common law, but such places are considered gaming-houses within the statute 32 Hen. 8, c. 9. *Hawk. P. C. b.* 1, *c.* 92, *s.* 92.

The proceedings against persons keeping gaming-houses, bawdy-houses, or disorderly houses, are facilitated by the statute 25 Geo. 2, c. 36, by the eighth section of which it is enacted, that any person who shall appear, act, or behave as the master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof. By section 9, inhabitants of the parish or place, though bound by recognizance, may give evidence upon the prosecution. By section 10, no indictment shall be removed by *certiorari*. This clause does not prevent the crown from removing the indictment. *Davies's case*, 5 *T. R.* 636.

After an indictment has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. *Wood's case*, 3 *B. & Ad.* 657.

No indictment for keeping a disorderly house can be removed by *certiorari*, whether the indictment be at the prosecution of the constable under 25 Geo. 2, c. 36, or at the instance of a private individual. *R.* v. *Sanders*, 9 *Q. B.* 235; *S. C.* 15 *L. J. M. C.* 158.

Proof of particular nuisances—bawdy-houses.] The keeping of a bawdy-house is a common nuisance, both on the ground of its corrupting public morals, and of its endangering the public peace, by drawing together dissolute persons. *Hawk. P. C. b.* 1, *c.* 74, *s.* 1; 5 *Bac. Ab. Nuisances*, (A.); 1 *Russ. by Grea.* 322. A *feme covert* is punishable for this offence as if she were sole. *Ibid.* *Williams's case*, 1 *Salk.* 383. And a lodger, who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house; see *Pierson's case*, 2 *Lord Raym.* 1197; but the bare solicitation of chastity is not indictable. *Hawk. P. C. b.* 1, *c.* 74, *s.* 1. Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts, see *Clarke* v. *Periam*, 2 *Atk.* 339, it being, in fact, a cumulative offence, *vide ante*, p. 87. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment. *J'Anson* v. *Stuart*, 1 *T. R.* 754; 1 *Russ. by Grea.* 326. The proceedings in prosecutions against bawdy-houses are facilitated by the statute 25 Geo. 2, c. 36, *supra*.

Proof of particular nuisances—play-houses, &c.] Play-houses having been originally instituted with the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may become so by drawing together numbers of people, to the inconvenience of the neighbourhood. *Hawk. P. C. b.* 1, *c* 75, *s.* 7; see 2 *B. & Ad.* 189.

Players, plays, and play-houses are now put under regulations by the 6 & 7 Vict. c. 68, pursuant to the 2nd sec. of which, all theatres which are not authorised by letters patent from the crown, or by

license from the lord chamberlain, or the justices of the peace, are unlawful.

By the 25 Geo. 2, c. 36, any house, room, garden or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London or Westminster, or within twenty miles thereof, without a license from the magistrates, shall be deemed a disorderly house, and the keeper is subjected to the penalty of 100*l.*, and is otherwise punishable as the law directs in cases of disorderly houses. A room used for public music or dancing is within the statute, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of the room, for either or both of those purposes, will not be within the act. *Per Lord Lyndhurst, C. B.*, *Gregory* v. *Tuffs*, 6 *C. & P.* 271. See also *Gregory* v. *Tavernor*, *ibid.* 280.

Proof of particular nuisances—gunpowder, &c.] Things likely to be productive of injury to the persons of those residing in the neighbourhood, are nuisances, as the erecting of gunpowder mills, or the keeping of a gunpowder magazine near a town. *Williams's case*, 5 *Burn's Justice*, *29th ed.* 235; *Taylor's case*, 2 *Str.* 1167; and see 12 *Geo.* 3, *c.* 61. So by the 10 Wm. 3, c. 7, the making, selling, or exposing to sale any fireworks, or throwing or firing them into any public street, or highway, is declared to be a common nuisance.

Proof of particular nuisances—dangerous animals.] Suffering fierce and dangerous animals, as a fierce bull-dog, which is used to bite people, to go at large, is an indictable offence. 4 *Burn's Justice*, 578. But where the animal is not of such a description as in general, from its ferocity, to endanger the persons of those it meets, in order to maintain an indictment, it must be shown that the owner was aware of the ferocity of that particular animal. 2 *Ld. Raym.* 1582.

Proof of particular nuisances—contagion, and unwholesome provisions.] It is an indictable offence to expose a person having a contagious disease, as the small-pox, in public. *Vantandillo's case*, 4 *M. & S.* 73; *Bronett's case*, *Id.* 272. See also the 3 & 4 Vict. c. 29, s. 8, which subjects to punishment by summary conviction, persons inoculating or otherwise producing small-pox. It is a nuisance for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells. *Dixon's case*, 3 *M. & S.* 11.

Proof of particular nuisances—eaves-dropping, common scold.] Eaves-droppers, or such as listen under walls or windows, or the eaves of houses, to hear discourses, and thereupon frame slanderous and mischievous tales, are common nuisances, and indictable, and may be punished by fine, and finding sureties of their good behaviour. 4 *Bl. Com.* 167; *Burn's Justice*, *Eaves Droppers*; 1 *Russ. by Grea.* 302.

So a common scold is indictable as a common nuisance, and upon conviction may be fined or imprisoned, or put into the ducking-stool. *Hawk. P. C. b.* 1, *c.* 75, *s.* 14; 4 *Bl. Com.* 168. The particulars need not be set forth in the indictment. *Hawk. P. C. b.* 2, *c.* 25, *s.* 59; nor is it necessary to prove the particular expressions used, it

is sufficient to give in evidence generally that the defendant is always scolding. *Per Buller, J., J'Anson* v. *Stuart*, 1 *T. R.* 754.

Proof of the liability of the defendant.] A man may be guilty of a nuisance by the act of his agent or servant. Thus it has been ruled that the directors of a gas company are liable for an act done by their superintendent and engineer, under a general authority to manage their works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. *Medley's case*, 6 *C. & P.* 292; see this case, *ante*, p. 779.

The indictment charged the defendant with keeping certain enclosed lands near the king's highway, for the purpose of persons frequenting the same to practise rifle shooting, and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons armed with fire-arms, to meet in the highways, &c., near the said enclosed grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near the public highway there, into a shooting-ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighbouring field to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held, that the evidence supported the allegation that the defendant caused such persons to assemble, discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place. *Moore's case*, 3 *B. & Ad.* 184.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.

If a party buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance. *Per Littledale, J.* And such purchaser is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance. *Pedley's case*, 1 *Ad. & E.* 822.

Punishment and abatement of the nuisance.] The punishment imposed by law on a person convicted of a nuisance is fine and imprisonment; but as the removal of the nuisance is of course the object of the indictment, the court will adapt the judgment to the circumstances of the case. If the nuisance, therefore, is alleged in the indictment to be still continuing, the judgment of the court may be, that the defendant shall remove it at his own cost. 1 *Hawk. c.* 75,

s. 14. But where the existence of the nuisance is not averred in the indictment, then the judgment of abatement would not be proper; for it would be absurd to give judgment to abate a thing which does not appear to exist. *Stead's case*, 8 *T. R.* 142; and see *R.* v. *Justices of Yorkshire*, 7 *T. R.* 468. And where the court are satisfied that the nuisance is effectually removed before judgment is prayed upon the indictment, they will in that case also refuse to give judgment to abate it. *Incledon's case*, 13 *East*, 127. When judgment of abatement is given, it is only to remove or pull down so much of the thing that actually causes the nuisance; as, if a house be built too high, the judgment is to pull down only so much of it as is too high. And the like where the defendant is convicted of a nuisance in carrying on an offensive trade, in which case the judgment is not to pull down the building where the trade is carried on, but only to prevent the defendant from using it again for the purpose of the offensive trade. *Pappineau's case*, 1 *Str.* 686; see 9 *Co.* 53; *Co. Ent.* 92 *b.*

Where a defendant had entered into a recognizance to appear at the assizes and plead to an indictment for nuisance, and at the time of the assizes he was on the continent in ill health; the nuisance having been abated, and the prosecutor being willing to consent to an acquittal; Patteson, J., after conferring with Erskine, J., under these circumstances, allowed a verdict of not guilty to be taken. *Macmichael's case*, 8 *C. & P.* 755.

The 18 & 19 Vict. c. 21, consolidates and amends the Nuisances Removal, and Diseases Prevention Acts, of 1848 and 1849; sect. 8 defines what shall be deemed nuisances within the provisions of that act, and sect. 27 gives a summary remedy in cases of nuisances arising from the carrying on of noxious trades and manufactures.

See further, titles *Bridges*, *Highways*.

OATHS—UNLAWFUL.

Statutes.] The offence of taking or administering unlawful oaths is provided against by the 37 Geo. 3, c. 123 (E.), and the 52 Geo. 3, c. 104 (E.).

By the former of these statutes (sec. 1), it is enacted, "that any person or persons who shall in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at, and consenting to the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same, to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy, formed for any such purpose; or to obey the order or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associated confederate or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done, or to be done; or not to reveal or discover any illegal oath or engagement, which may have been administered or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction, be adjudged guilty of felony, and be transported for any term not exceeding seven years, and every person who shall *take* such oath or engagement not being compelled thereto," is subject to the same punishment. See *Mark's case*, 3 *East*, 157.

By the 52 Geo. 3, c. 104, s. 1, "every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at, the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason, or murder, or any felony punishable by law with death, shall, on conviction, be adjudged guilty of felony [and suffer death as a felon, without benefit of clergy], and every person who shall *take* any such oath or engagement, not being compelled thereto, shall, on conviction, be adjudged guilty of felony, and be transported for life, or for such term of years as the court shall adjudge."

Now by the 1 Vict. c. 91, after reciting so much of the above section as relates to the administering of the oaths therein mentioned, and also the third section of the same act, it is enacted, "that if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 2, in cases of imprisonment, the court may award hard labour and solitary confinement.

The statutes are not confined to oaths administered with a seditious or mutinous intent. *Ball's case*, 6 *C. & P.* 563; *Brodribb's case*, *Id.* 571. And it is sufficient to aver that the oath was administered, not to give evidence against a person belonging to an association of persons associated to do a "certain illegal act." *Brodribb's case*, *supra*.

Proof of the oath.] With regard to what is to be considered an oath within these statutes, it is enacted by the 37 Geo. 3, c. 123, s. 5, that any engagement or obligation whatsoever, in the nature of an oath, and by 52 Geo. 3, c. 104, s. 6, that any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those statutes, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons, without any administration thereof by any other person or persons.

It is not necessary in the indictment to set forth the words of the oath or engagement, the purport of some material part thereof is sufficient. 37 *Geo.* 3, *c.* 123, *s.* 4; 52 *Geo.* 3, *c.* 104, *s.* 5; *Moore's case*, 6 *East*, 419 (*n*). Parol evidence may be given of the oath, though the party administering it appeared to read it from a paper, to produce which no notice has been given. *Moore's case, supra.* And where the terms of the oath are ambiguous, evidence of the declarations of the party administering it, made at the time, is admissible, to show the meaning of those terms. *Id.*

If the book on which the oath was administered was not the Testament, it is immaterial, if the party taking the oath believes himself to be under a binding engagement. *Brodribb's case*, 6 *C. & P.* 571; *Loveless's case*, 1 *Moo. & Rob.* 349; 6 *C. & P.* 596. Where the prisoners were indicted under the 37 Geo. 3, Williams, J., said, that with regard to the oath contemplated by the act of parliament, it was not required to be of a formal nature, but that it was sufficient if it was intended to operate as an oath, and was so understood by the party taking it. The precise form of the oath was not material, and the act provided against any evasions of its intentions by declaring (sec. 5), that any engagement or obligation whatever, in the nature of an oath, should be deemed an oath within the intent and meaning of the act, in whatever form or manner the same should be administered or taken. *Loveless's case*, 1 *Moo. & Rob.* 349; 6 *C. & P.* 596.

Proof of aiding and assisting.] Who shall be deemed persons aiding and assisting in the administration of unlawful oaths is declared by the third section of the 37 Geo. 3, c. 123, which enacts that persons aiding or assisting in, or present and consenting to the administering or taking of any oath or engagement before mentioned in that act, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such, although the person or persons who actually administered such oath or engagement, if any such there be, shall not have been tried or convicted.

Proof for prisoner—disclosure of facts.] In order to escape the penalties of these statutes, it is not sufficient for the prisoner merely to prove that he took the oath or engagement by compulsion, but in order to establish that defence, he must show that he has complied with the requisitions of the statutes, by the earlier of which (sec. 2), it is enacted, that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she knows touching the same, and the person or persons to whom and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of his Majesty's justices of the peace, or one of his Majesty's principal secretaries of state, or his Majesty's privy council, or in case the person taking such oath or engagement shall be in actual service in his majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer. The 52 Geo. 3, c. 104, contains a similar provision (sec. 2), fourteen days being substituted for four days.

It is also provided by both the above statutes, that any person who shall be tried and acquitted or convicted of any offence against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason; and further, that nothing in the acts contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same, as an offence against the acts, from being tried for the same, as high treason or misprision of high treason, in such manner as if these acts had not been made.

Unlawful combinations.] As connected with this head of offence the following statutes relative to unlawful combinations are shortly referred to.

By the 39 Geo. 3, c. 79, s. 2 (E.), all societies, the members whereof are required to take unlawful oaths, or engagements within the intent of the 37 Geo. 3, c. 123, or any oath not required or authorised by law, are declared unlawful combinations.

By s. 8, offenders may be summarily convicted, or may be proceeded against by indictment, and in the latter case are liable to transportation for seven years, or imprisoned for two years.

By the 57 Geo. 3, c. 19, s. 25 (E.), all societies, the members whereof shall be required to take any oath or any engagement which shall be unlawful within the 37 Geo. 3, c. 123, or the 52 Geo. 3, c. 104. or to take any oath not required, or authorised by law,

&c., are to be deemed guilty of unlawful combinations within the 39 Geo. 3, c. 79.

In *Dixon's case*, 6 *C. & P.* 601, Bosanquet, J., held that every person engaging in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the 57 Geo. 3, c. 19, s. 25.

Administering, &c., voluntary oaths, &c.] By the 5 & 6 Wm. 4, c. 62, s. 13, "it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively." See *R.* v. *Nott*, 4 *Q. B.* 768.

OFFICES—OFFENCES RELATING TO.

UNDER this head will be considered the evidence requisite in prosecutions against officers,—1, for malfeasance; 2, for nonfeasance; 3, for extortion; and, 4, for refusing to execute an office.

Proof of malfeasance—illegal acts in general.] It is a general rule that a public officer is indictable for misbehaviour in his office. *Anon.* 6 *Mod.* 96. And where the act done is clearly illegal, it is not necessary, in order to support an indictment, to show that it was done with corrupt motives. Thus, where a license having been refused by certain magistrates, another set of magistrates, having concurrent jurisdiction, appointed a subsequent day for a meeting, and granted the license which had been refused before, it was held that this was an illegal act, and punishable by indictment, without the addition of corrupt motives. *Sainsbury's case*, 4 *T. R.* 451. Still more is such an offence punishable when it proceeds from malicious or corrupt motives. *Williams's case*, 3 *Burr.* 1317; *Holland's case*, 1 *T. R.* 692. A gaoler is punishable for barbarously misusing the prisoners, *Hawk. P. C. b.* 1, *c.* 66, *s.* 2. So overseers of the poor for misusing paupers, as by lodging them in unwholesome apartments. *Wetheril's case*, *Cald.* 432; or by exacting labour from such as are unfit to work. *Winship's case*, *Cald.* 76. But it is no part of their duty to cause paupers to be vaccinated. 3 *Ad. & E.* 552. Public officers are also indictable for frauds committed by them in the course of their employment. As where an overseer receives from the father of a bastard a sum of money as a compensation with the parish, and neglects to give credit for this sum in account, he is punishable, though the contract is illegal. *Martin's case*, 2 *Campb.* 268. See also *Bembridge's case*, *cited* 6 *East*, 136. Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his fault indictable. *Per Cur.*, *Wyat's case*, 1 *Salk.* 380.

Upon an indictment against a public officer for neglect of duty, it is sufficient to state that he was such officer without stating his appointment; neither is it necessary to aver that the defendant had notice of all the facts alleged in the indictment, if it was his official duty to have known them. So where a defendant is charged with disobedience of certain orders communicated to him, it need not be

alleged that such orders still continue in force, as they will be assumed to continue in force until they are revoked. And an indictment for neglect of duty under a particular statute need not state that the neglect was corrupt, if the statute makes a *wilful* neglect a misdemeanor. *Holland's case*, 5 *T. R.* 607.

Every malfeasance or culpable nonfeasance of an officer of justice, with relation to his office, is a misdemeanor, and punishable with fine or imprisonment, or both.

As to the sale of offices, see *R.* v. *Charretie*, 13 *Q. B.* 447; and *Hopkins* v. *Prescott*, 4 *C. B.* 578.

Proof of nonfeasance.] Upon a prosecution for not performing the duties of an office, the prosecutor must prove, 1, that the defendant holds the office; 2, that it was his duty, and within his power to perform the particular act; and 3, that he neglected so to do.

Where an officer is bound by virtue of his office to perform an act, the neglect to perform that act is an indictable offence. Thus a coroner, 2 *Chitt. C. L.* 255; 1 *Russ. by Grea.* 138; a constable, *Wyat's case*, 1 *Salk.* 380; a sheriff, *Antrobus's case*, 6 *C. & P.* 784; and an overseer of the poor, *Tawney's case*, 1 *Bott.* 333; are indictable for not performing their several duties. The majority of the judges were of opinion, that an overseer cannot be indicted for not relieving a pauper, unless there has been an order of justices for such relief, or unless in a case of immediate and urgent necessity. *Meredith's case*, *Russ. & Ry.* 46. But where the indictment stated that the defendant (an overseer) had under his care a poor woman belonging to his township, but neglected to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want, &c., died, the defendant was convicted, and sentenced to a year's imprisonment. *Booth's case*, *Ibid.* 47 (*n*). And in a case where an overseer was indicted for neglecting, when required, to supply medical assistance to a pauper labouring under dangerous illness, it was held that the offence was sufficiently charged and proved, though the pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. *Warren's case*, *coram Holroyd*, *Ibid.* p. 48 (*n*).

By the 11 Geo. 1, c. 4, the chief officers of corporations, absenting themselves on the charter day for the election of officers, shall be imprisoned for six months. Such offence, however, is not indictable within the statute, unless their presence is necessary to constitute a legal corporate assembly. *Corry's case*, 5 *East*, 372.

Proof of extortion.] One of the most serious offences committed by persons in office is that of extortion, which is defined to be the taking of money by an officer by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. *Hawk. P. C. b.* 1, *c.* 68, *s.* 1. So the refusal by a public officer to perform the duties of his office, until his fees have been paid, is extortion. 3 *Inst.* 149; *Hescott's case*, 1 *Salk.* 330; *Hutt.* 53. So it is extortion for a miller or a ferryman to take more toll than is due by custom. *Burdett's case*, *infra.* So where the farmer of a market erected such a number of stalls that the market people had not space to sell their wares, it was held that the taking money from them for the use of the stalls was extortion. *Burdett's case*, 1 *Ld. Raym.* 149.

The prosecutor must be prepared to prove, first, that the defendant fills the office in question. For this purpose it will be sufficient to show, that he has *acted* as such officer; and secondly, the fact of the extortion. This must be done by showing what are the usual fees of the office, and proving the extortion of more. Several persons may be indicted jointly, if all are concerned; for in this offence there are no accessaries, but all are principals. *Atkinson's case*, 2 *Ld. Raym.* 1248; 1 *Salk.* 382; *Loggen's case*, 1 *Str.* 75.

The indictment must state the sum which the defendant received, but the exact sum need not be proved, as where he is indicted for extorting twenty shillings, it is sufficient to prove that he extorted one shilling. *Burdett's case*, 1 *Ld. Raym.* 149; *Gillham's case*, 6 *T. R.* 267; *Higgins's case*, 4 *C. & P.* 247.

The offence of extortion is punishable as a misdemeanor at common law, by fine and imprisonment, and by removal from office. *Hawk. P. C. b.* 1, *c.* 68, *s.* 5. Penalties are likewise added by the statute of Westm. 1, c. 26.

It is also an indictable offence to persuade another to extort money from a person, whereby money actually was extorted from him. *Tracy's case*, 3 *Salk.* 192.

Extortion by public officers in the East Indies.] The 33 Geo. 3, c. 52, s. 62, enacts, that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his majesty, or the company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value; but the court may order such present to be restored to the party who gave it, or may order it or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

In *R.* v. *Douglas*, 13 *Q. B.* 74; *S. C.* 17 *L. J. M. C.*, 176, Parke, B., in delivering the judgment of the Exchequer Chamber, confirming that of the Queen's Bench, said, "the object of the Legislature was to prevent a person receiving any gift, or present, or sum of money, in the East Indies (he being an officer of the Government, or of the East India Company,) absolutely, whatever the reason of that gift might be;" and added, "it was thought by the Legislature, looking at the balance of convenience and inconvenience, that great advantages were obtained by putting an end to gifts altogether, though it might be at the expense of some occasional mischief to innocent persons."

Extortions by registrars of joint stock companies.] By the 7 & 8 Vict. c. 110 (an act for the registration, incorporation, and regulation of joint stock companies) s. 22, "if either the said registrar of joint stock companies, or any person employed under him, either demand or receive any gratuity or reward in respect of any service performed by him, other than the fees aforesaid, then for every such offence, every such registrar or person shall be guilty of a misdemeanor."

Proof on prosecutions for refusing to execute an office.] A refusal to execute an office to which a party is duly chosen, is an indictable offence, as that of constable; *Lone's case*, 2 *Str.* 920; *Genge's case*,

Cowp. 13; or overseer. *Jones's case*, 2 *Str.* 1145; 7 *Mod.* 410; 1 *Russ. by Grea.* 145.

The prosecutor must prove the election or appointment of the defendant, his liability to serve, notice to him of his appointment, and his refusal. It must appear that the persons appointing him had power so to do. Thus on an indictment for not serving the office of constable on the appointment of a corporation, it must be stated and proved that the corporation had power by prescription to make such an appointment, for they possess no such power of common right. *Bernard's case*, 2 *Salk.* 52; 1 *Ld. Raym.* 94. The notice of his appointment must then be proved, *Harper's case*, 5 *Mod.* 96, and his refusal, or neglect to perform the duties of the office, from which a refusal may be presumed.

For the defence it may be shown that the defendant is not an inhabitant resiant of the place for which he is chosen. *Adlard's case*, 4 *B. & C.* 772; *Donne* v. *Martyr*, 8 *B. & C.* 62; and see the other grounds of exception enumerated in *Archb. Cr. Pr.* 669, 10*th ed.* It is not any defence that the defendant resides in the jurisdiction of a leet within the hundred or place for which he is elected; *Genge's case*, *Cowp.* 13; or that no constable had ever before been appointed for the place. 2 *Keb.* 557.

The punishment is fine or imprisonment, or both. See *Bower's case*, 1 *B. & C.* 587.

PERJURY.

THE proofs required to support an indictment for perjury at common law will be first considered, and the statutes creating the offence of perjury in various cases will be subsequently stated.

Perjury at common law.] Perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. *Hawk. P. C. b.* 1, *c.* 69, *s.* 1. The proceedings, however, are not confined to courts of justice. *Vide post*, p. 796.

The necessity for showing distinctly that the false oath was taken in a judicial proceeding, is not dispensed with by the 23 Geo. 2, c. 11, s. 1. *R.* v. *Overton*, 4 *Q. B.* 83.

To support an indictment for perjury, the prosecutor must prove, 1, the authority to administer an oath; 2, the occasion of administering it; 3, the taking of the oath; 4, the substance of the oath; 5, the materiality of the matter sworn; 6, the introductory averments; 7, the falsity of the matter sworn; and, 8, the corrupt intention of the defendant. 2 *Stark. Ev.* 621, 2*nd ed.*

Proof of the authority to administer an oath.] Where the oath has been administered by a master in chancery, surrogate, or commissioner, having a general authority for that purpose, it is not necessary to prove his appointment; it being sufficient to show that he has acted in that character. See the cases cited, *ante*, p. 6. But as this evidence is only presumptive, it may be rebutted, and the defendant may show that there was no appointment, or that it was

illegal. Thus after proof that the oath had been made before a person who acted as a surrogate, the defendant showed that he had not been appointed according to the canon, and was acquitted. *Verelst's case*, 3 *Camp.* 432. Where the party administering the oath derives his authority from a special commission, directed to him for that purpose, it is necessary to prove the authority, by the production and proof of the commission which creates the special authority. 2 *Stark. Ev.* 622, 2*nd ed.* Thus upon an indictment for perjury against a bankrupt, in passing his last examination, Lord Ellenborough ruled that it was necessary to give strict proof of the bankruptcy, which went to the authority of the commissioners to administer an oath, for unless the defendant really was a bankrupt the examination was unauthorised. *R.* v. *Punshon*, 3 *Camp.* 96; 3 *B. & C.* 354. See also *Ewington's case*, 2 *Moo. C. C. R.* 223, *post*, p. 797.

Where a cause was referred by a judge's order, and it was directed that the witnesses should be sworn before a judge, "or before a commissioner *duly authorised*," and a witness was sworn before a commissioner for taking affidavits (empowered by stat. 29 Car. 2, c. 5), it was held that he was not indictable for perjury, the commissioner not being "duly authorised" by the statute to administer an oath for a *viva voce* examination. *Hanks's case*, 3 *C. & P.* 419. So a master extraordinary in chancery, not having any authority to administer oaths in matters before the Court of Admiralty, a conviction for perjury in an affidavit used in the Court of Admiralty and sworn before a master extraordinary in Chancery was held to be bad. *Stone's case*, 1 *Dears. C. C. R.* 251; *S. C. L. J. M. C.* So an arbitrator under the 9 & 10 Vict. c. 95, s. 77, not having authority to administer an oath, false evidence given before him is not the subject of perjury. *Hallett's case*, 2 *Den. C. C. R.* 237; *S. C.* 29 *L. J. M. C.* 197.

Where perjury was charged to have been committed on that which was in effect the affidavit on an interpleader rule; and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act: Coleridge, J., held that the indictment was bad, as the affidavit did not appear to be made on a *judicial* proceeding: since for anything that appeared it might have been a voluntary oath. *R.* v. *Bishop*, *Carr. & M.* 302.

In the case of a trial taking place where the court has no jurisdiction, for evidence given thereat, a witness cannot be indicted for perjury. *Cohen's case*, 1 *Stark. N. P. C.* 511; *Baston* v. *Gouch*, 3 *Salk.* 269. But a false oath taken before commissioners, whose commission is at the time in strictness determined by the death of the king, is perjury, if taken before the commissioners had notice of the demise. *Hawk. P. C, b.* 1, *c.* 69, *s.* 4; 2 *Russ. by Grea.* 599.

Perjury was committed before magistrates upon the second application for a bastardy order, a former application having been dismissed on the merits; but it was held, that the magistrates had jurisdiction, and the conviction was good. *Cooke's case*, 2 *Den. C. C. R.* 462; *S. C.* 21 *L. J. M. C.* 136. An affidavit of debt made under 1 & 2 Vict. c. 110, s. 8, and sworn before a registrar of the Court of Bankruptcy, is sworn before a competent authority, and perjury may be assigned upon it. *Dunn's case*, 16 *L. J. Q. B.* 382.

No oath taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public

nature without legal authority; or before those who are authorised to administer some oaths, but not that which happens to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seeming colourable, but in truth void, can ever amount to perjury in the eye of the law, for they are of no manner of force. *Hawk. P. C. b.* 1, *c.* 69, *s.* 4; 2 *Russ. by Grea.* 599.

The authority by which the party is empowered to administer the oath, must, if specially described, be proved as laid. Therefore, where the indictment stated the oath to have been administered at the assizes, before justices *assigned to take the said assizes*, before A. B., one of the said justices, the said justices having then and there power, &c., and in fact the judge, when the oath was administered, was sitting under the commission of *oyer* and *terminer* and gaol delivery, this was held to be a fatal variance. *Lincoln's case, Russ. & Ry.* 421. But an indictment for perjury at the assizes may allege the oath to have been taken before *one* of the judges in the commission, though the names of both appear. *Alford's case*, 1 *Leach*, 150. See *Coppard's case, post*, p. 806.

The recent statute 14 & 15 Vict. c. 100, s. 20, enacts, "that in every indictment for perjury, &c., it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing was taken, made, signed or subscribed without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed."

In an indictment for perjury, intended to be charged as having been committed in the course of the trial of an appeal before the commissioners of assessed taxes, it is necessary to set out with particularity all that is requisite, to give the commissioners jurisdiction to try the appeal. *R.* v. ——, 1 *Cox, C. C.* 50. So on an indictment for perjury alleged to have been committed on the hearing of an information under the beer act, 1 Wm. 4, c. 64, s. 15, before two justices at petty sessions; Park and Patteson, JJ., held that it was necessary to aver that the justices were acting in and for the division or place in which the house was situate; but that it was not necessary to allege they were acting in petty session, as every meeting of two justices in one place for business is itself a petty session. *Rawlins's case*, 8 *C. & P.* 439. An indictment for perjury committed before a magistrate, stated that the defendant went before the magistrate and was sworn, and that being so sworn, he did falsely, &c., "say, depose, swear, charge, and give the said justice to be informed," that he saw, &c.; it was held by the judges, that this sufficiently showed that the oath was taken in a judicial proceeding. *Gardiner's case*, 8 *C. & P.* 737; *S. C.* 2 *Moo. C. C.* 95. In a previous case, where the indictment merely stated that the defendant, intending to subject W. M. to the penalties of felony, went before two magistrates, and "did depose and swear," &c. (setting out a deposition, which stated, that W. B. had put his hand into the defendant's pocket, and taken out a 5*l.* note), and assigning perjury upon it; Coleridge, J., held that the indictment was bad, as it did not show that any charge of felony had been previously made, or that the defendants then made any charge of felony, or that any judicial proceeding was pending before the magistrates. *Pearson's case*, 8 *C. & P.* 119.

An information laid under the game act, the 1 & 2 Wm. 4, c. 32, s. 30, and in pursuance of the same statute, s. 41, and the 6 & 7 Wm. 4, c. 65, s. 9, if laid by a person not deposing on oath to the matter of charge, must distinctly show that the charge was deposed to by some other credible witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction; and if the defendant is summoned, and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury. *R.* v. *Scotton*, 5 *Q. B.* 493; see also *R.* v. *Goodfellow*, *Carr.* & *M.* 569. But unless a statute requires it, an information need not be on oath, and therefore under the 24th section of the malicious trespass act, 7 & 8 Geo. 4, c. 30, an information upon oath is not requisite in order to give the magistrates jurisdiction. *Millard's case*, 1 *Dears. C. C. R.* 166; *S. C.* 22 *L. J. M. C.* 108. It is not necessary in the indictment to show the *nature* of the authority of the party administering the oath. *Callanan's case*, 6 *B.* & *C.* 602.

Proof of the occasion of administering the oath.] The occasion of administering the oath must be proved as stated. Thus, if the perjury were committed on the trial of a cause at nisi prius, the record must be produced in order to show that such a trial was had; 2 *Stark. Ev.* 622, 2*d ed.*; and for this purpose the nisi prius record is sufficient. *Iles' case*, *Cases temp. Hardw.* 118, *ante*, p. 193. The occasion, and the parties before whom it came on to be tried, must be correctly stated. Where it was averred that a cause came on to be tried before Lloyd, Lord Kenyon, &c., *William Jones* being associated, &c., and it appeared that *Roger Kenyon* was associated, this was ruled a fatal variance. *Eden's case*, 1 *Esp.* 97. See also *Fellowes's case*, 1 *C.* & *K.* 115. But where an indictment alleged that the trial of an issue took place before E., sheriff of D., by virtue of a writ directed to the said sheriff; and the writ of trial put in evidence was directed to the sheriff, and the return was of a trial before him, but in fact the trial took place before a deputy, not the under-sheriff, it was held no variance. *Dunn's case*, 2 *Moo. C. C.* 297; 1 *C.* & *K.* 730. It is not merely before courts of justice, even at common law, that persons taking false oaths are punishable for perjury. Any false oath is punishable as perjury, which tends to mislead a court in any of its proceedings relating to a matter judicially before it, though it in no way affects the principal judgment which is to be given in the cause; as an oath made by a person offering himself as bail. And not only such oaths as are taken on judicial proceedings, but also such as any way tend to abuse the administration of justice are properly perjuries, as an oath before a justice to compel another to find sureties of the peace; before commissioners appointed by the king to inquire into the forfeiture of his tenants' estates, or commissioners appointed by the king to inquire into defective titles. *Hawk. P. C. b.* 1, *c.* 69, *s.* 3. A false oath in any court, whether of record or not, is indictable for perjury. 5 *Mod.* 348. And perjury may be assigned upon the oath against simony, taken by clergymen at the time of their institution. *Lewis's case*, 1 *Str.* 70. A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment. *Hughes's case*, 1 *C.* & *K.* 519.

A man may be indicted for perjury in an oath taken by him in his

own cause, as in an answer in chancery, or to interrogatories concerning a contempt, or in an affidavit, &c., as well as by an oath taken by him as a witness in the cause of another person. *Hawk. P. C. b.* 1, *c.* 69, *s.* 5.

Perjury cannot be assigned upon a false verdict, for jurors are not sworn to depose the truth, but only to judge truly of the depositions of others. *Id.*

Where the prisoner was indicted for taking a false oath before a surrogate to procure a marriage licence, being convicted, the judges, on a case reserved, were of opinion that perjury could not be charged upon an oath taken before a surrogate. They were also of opinion that as the indictment in this case did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted. *Foster's case, Russ. & Ry.* 459; and see *Alexander's case*, 1 *Leach*, 63; see also 1 *Vent.* 370, and *Deacon's* observations, 2 *Dig. C. L.* 1001. But a surrogate has power to administer an oath, and a false oath taken before him for the purpose of obtaining a marriage licence, is a misdemeanor. *Chapman's case*, 1 *Den. C. C. R.* 432; *S. C.* 18 *L. J. M. C.* 152.

Perjury cannot be assigned upon an affidavit sworn in the insolvent debtors' court by an insolvent respecting the state of his property and his expenditure, for the purpose of obtaining an extended time to petition under the 10th section of the 7 Geo. 4, c. 57, without proving that the court by its practice requires such an affidavit. And such proof is not given by an officer of the court producing printed rules, purporting to be rules of the court, which he has obtained from the clerk of the rules, and is in the habit of delivering out as rules of the court, but which are not otherwise shown to be rules of the court, the officer professing to have no knowledge of the practice, except from such printed rules. *Koop's case*, 6 *Ad. & E.* 198. Tenterden, C. J., held that an indictment for perjury would not lie under the 71st section of the 7 Geo. 4, c. 57, against an insolvent debtor for omissions of property in his schedule, such offence being made liable to punishment under the 70th section as a substantive misdemeanor. *Mudie's case*, 1 *Moo. & R.* 128.

The object with which the oath was taken need not be carried into effect, for the perjury is complete at the moment when the oath was taken, whatever be the subsequent proceedings. Thus where the defendant was indicted for perjury in an affidavit which could not, from certain defects in the *jurat*, be received in the court for which it was sworn; Littledale, J., was of opinion that nevertheless perjury might be assigned upon it. *Hailey's case, Ry. & Moo. N. P. C.* 94. So it was ruled by Tenterden, C. J., that a party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction. *White's case, Moody & Malkin*, 271.

Perjury cannot be committed in evidence given before commissioners of bankrupt, where there was no good petitioning creditor's debt to support the fiat. *Ewington's case*, 2 *Moo. C. C.* 223; *S. C. Carr. & M.* 319.

The enforced answers of a bankrupt under examination of a bankruptcy commissioner to questions relating to matters specified in sect. 117 of the Bankrupt Consolidation Act, 1849, may be given in evidence by the prosecution on any criminal proceeding against the bankrupt. *Scott's case*, 25 *L. J. M. C.* 128.

Proof of the taking of the oath.] It is sufficient in the indictment to state that the defendant *duly* took the oath. *M'Arthur's case, Peake, N. P. C.* 155. But where it was averred that he was *sworn on the Gospels*, and it appeared that he had been sworn according to the custom of his own country, without kissing the book, it was held a fatal variance, though the averment was afterwards proved by its appearing that he was previously sworn in the ordinary manner. *Id.*

The mode of proving that the defendant was sworn, in an indictment for perjury in an answer in chancery, is by producing the original answer signed by him, and proving his handwriting, and that of the master in chancery to the *jurat*, together with proof of the identity of the defendant. *Morris's case*, 1 *Leach*, 50; 2 *Burr.* 1189; *Benson's case*, 2 *Campb.* 508. The making of an affidavit is proved in the same manner by production and proof of the handwriting.

Where the affidavit upon which the perjury was assigned was signed only with the mark of the defendant, and the *jurat* did not state that the affidavit was read over to the party, Littledale, J., said, "As the defendant is illiterate, it must be shown that she understood the affidavit. Where the affidavit is made by a person who can write, the supposition is that such person is acquainted with its contents, but in the case of a marksman it is not so. If in such a case a master by the *jurat* authenticates the fact of its having been read over, we give him credit, but if not, he ought to be called upon to prove it. I should have difficulty in allowing the parol evidence of any other person." *Hailey's case*, 1 *C. & P.* 258.

It is incumbent upon the prosecutor to give precise and positive proof that the defendant was the person who took the oath. *Brady's case*, 1 *Leach*, 330; but this rule must not be taken to exclude circumstantial evidence. *Price's case*, 6 *East*, 323; 2 *Stark. Ev.* 624, 2*d ed.*

It must appear that the oath was taken in the county where the venue is laid; and the recital in the *jurat* of the place where the oath is administered, is sufficient evidence that it was administered at the place named. *Spencer's case, Ry. & Moo. N. P. C.* 98. But though the *jurat* state the oath to be taken in one county, the prosecutor may show that it was in fact taken in another. *Emden's case*, 9 *East*, 437.

The making of a false affirmation by a quaker or moravian, must be proved in the same manner as the taking of a false oath. By the 22 Geo. 2, c. 46, s. 36, if any quaker making the declaration or affirmation therein mentioned, shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed and declared any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the pains, penalties, &c., inflicted on persons convicted of wilful and corrupt perjury. The 9 Geo. 4, c. 32, 3 & 4 Wm. 4, c. 49, 3 & 4 Wm. 4, c. 82, and 1 & 2 Vict. c. 77, which admit the evidence of quakers, moravians, and separatists, in all cases whatsoever, criminal, or civil, contain similar clauses; and there are various other statutes by which false affirmations are subjected to the penalties inflicted on perjury.

The recent statute 17 & 18 Vict. c. 125, s. 20, enacts, that "if any person called as a witness or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer or person qualified to take affidavits or depositions

upon being satisfied of the sincerity of such objections, to permit such person instead of being sworn to make his or her solemn affirmation," &c.

And by sect. 21, "if any person making such solemn affirmation or declaration, shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury."

Although the taking of a false oath required by statute is a misdemeanor, it is not perjury, unless made so by the statute. *Mudie's case*, and *Chapman's case*, *ante*, p. 797; and see *De Beauvoir's case*, 7 *C. & P.* 20; and see also *Harris's case*, *Id.* 253; and *Dodsworth's case*, 8 *C. & P.* 218; as to giving false answers at an election.

By the 5 & 6 Wm. 4, c. 62, abolishing unnecessary oaths, (see *ante*, p. 788,) and substituting declarations in lieu thereof (but which, by s. 9, does not extend to proceedings in courts of justice, or before justices of the peace), persons making false declarations shall (s. 21) be guilty of a misdemeanor.

Proof of the substance of the oath.] In proving the substance of the oath, or the matter sworn to by the defendant, it was long a question how far it was incumbent on the prosecutor to prove the whole of the defendant's statement relative to the same subject-matter, as where he has been both examined and cross-examined; or whether it was sufficient for him merely to prove so much of the substance of the oath as was set out on the record, leaving it to the defendant to prove any other part of the evidence given by him, which qualified or explained the part set out. Thus Lord Kenyon ruled, that the whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part, it would not be perjury. *Jones's case*, *N. P. C.* 38; see also *R.* v. *Dowlin*, *Id.* 170; 2 *Chitty*, *C. L.* 312, *2d ed.*; *Anon. cor. Lord Gifford*, *cited Ry. & Moo. N. P. C.* 300; *vide post.*

It was formerly thought that an oath did not amount to perjury unless sworn in absolute and direct terms, and that if a man swore according as he *thought*, *remembered*, or *believed* only, he could not be convicted of perjury. 3 *Inst.* 166. But the modern doctrine is otherwise. It is said by Lord Mansfield to be certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true, which he knows to be false; *Pedley's case*, 1 *Leach*, 327. The difficulty, if any, is in the proof of the assignment. *Schlesinger's case*, 10 *Q. B.* 670; *S. C.* 17 *L. J. M. C.* 29.

So perjury may be committed by swearing to a statement which in one sense is true, but which, in the sense intended to be impressed by the party swearing, is false, as in a case mentioned by Lord Mansfield. The witness swore that he left the party whose health was in question, in such a way that were he to go on as he then was, he would not live two hours. It afterwards turned out that the man was very well, but had got a bottle of gin to his mouth, and true it was, in a sense of equivocation, that had he continued to pour the liquor down, he would in much less time than two hours have been a dead man. *Loft's Gilb. Ev.* 662.

No case appears to have occurred in our law of an indictment for

perjury for mere matter of *opinion*. The following observations on this subject are from the pages of an eminent writer on the criminal law of Scotland.

If the matter sworn to, be one of opinion only, as a medical opinion, it cannot in the general case be made the foundation of a prosecution for perjury. But though a medical or scientific opinion cannot in general be challenged as perjury, because the uncertainty and division of opinion in the medical profession is proverbial; yet, if it assert a fact, or draw an inference evidently false, as for example, if a medical attendant swear that a person is unfit to travel who is in perfect health, or an architect shall declare a tenement to be ruined, which is in good condition, certainly the gross falsehood of such an assertion shall in neither case be protected by the plea that it related to a matter of professional investigation. *Alison, Princ. Cr. Law of Scotl.* 468.

A doubt may arise, whether a witness can be convicted of perjury, in answer to a question which he could not legally be called upon to answer, but which is material to the point in issue. No decision upon this subject appears to have taken place in our courts; but in Scotland it has been held, that a conviction for perjury in such case cannot be maintained. Speaking of the general rule, that where the matter is pertinent to the issue, the party taking a false oath will be guilty of perjury, Mr. Alison says, "There is one exception, however, to this rule, where the matter on which the perjury was alleged to have been committed was such, as it was not competent to examine the witness upon, however material to the issue; for law cannot lend the terrors of its punishment to protect a party in pursuing an incompetent and illegal train of investigation. On this ground it was, that the decision went, in the case of Patrick M'Curly, 4th August, 1777, who had been precognosced with a view to a criminal trial, and, afterwards, as often happens, had given a different account of the matter on the trial itself. Towards the close of his deposition, he was asked whether he had ever given a different account of the matter, and he swore he had not. Upon this last falsehood he was indicted for perjury; and after a debate on the relevancy, the prosecutor abandoned the charge; nor, in truth, does it seem possible to maintain an indictment for perjury in such a case, where the question was clearly incompetent, and the witness would have been entitled to decline answering it." *Prin. Crim. Law Scot.* 470.

Where on an indictment for perjury, upon the trial of an action, it appeared that the evidence given on that trial by the defendant contained all the matter charged as perjury, but other statements not varying the sense intervened between the matters set out, Abbott, C. J., held the omission immaterial, since the effect of what was stated was not varied. *Soloman's case, Ry. & Moo. N. P. C.* 252. So where perjury was assigned upon several parts of an affidavit, it was held that those parts might be set out in the indictment as if continuous, although they were in fact separated by the introduction of other matter. *Callanan's case*, 6 *B. & C.* 102. It seems that where the indictment set forth the *substance* and *effect* of the matters sworn, it must be proved, that in substance and effect, the defendant swore the whole of what is thus set forth as his evidence, although the count contains several distinct assignments of perjury. *Leef's case*, 2 *Campb.* 134; 4 *B. & C.* 852. Where the indictment charged that the defendant in substance and effect swore, &c., and it appeared that the deposition was made by him and his wife jointly, he following

up the statement of the wife, this was held to be no variance: *Grendall's case*, 2 *C. & P.* 563. An indictment for perjury alleged to have been committed in an affidavit sworn before the commissioner of the court of chancery stated that a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt. It then stated, that the defendant preferred his petition to the Lord Chancellor, setting forth various matters, and amongst others, the issuing of the commission, that the petitioner was declared a bankrupt, and that his estate was seized under the commission, and that, at the second meeting, one A. B. was appointed assignee, and an assignment made to him, and that he possessed himself of the estate and effects of the petitioner. It then stated, that at the several meetings before the *commission*, the petitioner declared openly, and in the presence and hearing of the said assignee, to a certain effect. At the trial the petition was produced, and it appeared that the allegation was, that at the several meetings before the *commissioners*, the petitioner declared to that effect. It was held that this was no variance, inasmuch as it was sufficient to set out in the indictment the petition in substance and effect, and the word "commission" was one of equivocal meaning, and used to denote either a trust or authority exercised, or the *persons* by whom the trust or authority was exercised, and that it sufficiently appeared, from the context of the petition set forth in the indictment, that it was used in the latter sense. *Dudman's case*, 4 *B. & C.* 850. Where the indictment professes to set out the substance and effect of the matter sworn to, and in the deposition a word is omitted, which is supplied in the setting forth of the deposition in the indictment, this is a fatal variance; the proper mode in such cases is, to set forth the deposition as it really is, and to supply the sense by an innuendo. *Taylor's case*, 1 *Campb.* 404. And where the indictment, in setting out the *substance* and *effect* of the bill in equity upon the answer to which the perjury was assigned, stated an agreement between the prosecutor and the defendant respecting *houses*, and upon the original bill being read, it appeared that the word was *house* (in the singular number), Abbott, C. J., said, The indictment professes to describe the substance and effect of this bill; it does not, certainly, profess to set out the tenor, but this I think is a difference in substance, and consequently a fatal variance. *Spencer's case*, *Ry. & Moo. N. P. C.* 98.

The omission of a letter, in setting out the affidavit on which perjury is assigned, will not be material, if the sense is not altered thereby, as *undertood* for *understood*. Although it be under an averment, "to the tenor and effect *following*." *Beech's case*, 1 *Leach*, 133; *Cowp.* 229.

In a late case, where the witness stated, that she could not undertake to say that he had given the whole of the prisoner's testimony, but to the best of his recollection he had given all that was material to the inquiry, and relating to the transaction in question; Littledale, J., thought that this evidence was *primâ facie* sufficient, and that if there was any thing else material sworn by the prisoner on the former trial, he might prove it on his part. No such evidence having been given, the prisoner was convicted, and on a case reserved, the judges held that the proof was sufficient for the jury, and that the conviction was right. *Rowley's case*, *Ry. & Moo. N. P. C.* 299; 1 *Moody, C. C.* 111. Where it has once been proved, says Mr. Starkie, that particular facts positively and deliberately sworn to by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle

to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had sworn to. 2 *Stark. Ev.* 625, *2nd ed.*

The defendant, although perjury be assigned on his answer, deposition, or affidavit in writing, may prove that an explanation was afterwards given, qualifying or limiting the first answer. 2 *Stark. Ev.* 627, *2nd ed.;* 2 *Russ. by Grea.* 658; *Carr's case, Sid.* 418. And if it appear, on the evidence for the prosecution, that a part of the defendant's statement, qualifying the rest, is omitted, the judge will not suffer the case to go to the jury. The defendant had paid a bill for a Mr. Shipley, and summoned a party named Watson, to whom he had paid it, before the court of requests for an overcharge. The defendant was asked whether Watson was indebted to him in the sum of 11*s*., he answered, "he is." On the question being repeated, and the witness required to recollect himself, he subjoined, "as agent for Mr. Shipley." He was indicted for perjury upon his first answer only, but it appearing upon the case for the prosecution, that he had qualified that answer, Nares, J., refused to permit the case to go to the jury, observing that it was perjury, assigned on part only of an oath, the most material part being purposely kept back. *Hurry's case*, 1 *Lofft's Gilb. Ev.* 57.

On the trial of an indictment for perjury alleged to have been committed before a magistrate, the written deposition of the defendant taken down by the magistrate was put in to prove what he then swore, and it was proposed to call the attorney for the prosecution to prove some other matters sworn to by the defendant, which were not mentioned in the depositions; Parke, J., held that this could not be done. *Wylde's case*, 6 *C. & P.* 380. See *ante*, p. 71.

Proof of the materiality of the matter sworn.] It must either appear on the face of the facts set forth in the indictment, that the matter sworn to, and upon which the jury is assigned, was material, or there must be an express averment to that effect. *Dowlin's case*, 5 *T. R.* 318; *Nicholl's case*, 1 *B. & Ad.* 21; *M'Keron's case*, 2 *Russ by Grea.* 639. An express averment that a question was material, lets in evidence to prove that it was so. *Bennett's case*, 2 *Den. C. C. R.* 241; *S. C.* 20 *L. J. M. C.* 217. Where upon an indictment for perjury committed in an answer in chancery, the perjury was assigned in the defendant's denial, in the answer, of his having agreed, upon forming an insurance company, of which he was a director, &c., to advance 10,000*l*. for three years, to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, nor what was prayed; the judgment was arrested. *Bignold's case*, 2 *Russ. by Grea.* 639. So perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds. *Benesech's case*, *Peake's Add. Cases*, 93.

The materiality of the matter sworn to must depend upon the state of the cause, and the nature of the question in issue. If the oath is altogether foreign from the purpose, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury. As if upon a trial in which the issue is, whether such a one is *compos* or not, a witness introduces his evidence by giving an account of a journey which he took to see the party, and swears falsely in relation to some of the circumstances of the journey. So

where a witness was asked by a judge, whether he brought a certain number of sheep from one town to another altogether, and answered that he did so, whereas in truth he did not bring them altogether, but part at one time and part at another, yet he was not guilty of perjury, because the substance of the question was, whether he brought them all or not, and the manner of bringing was only circumstance. (2 *Rolle*, 41, 369.) Upon the same ground it is said to have been adjudged, that where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties, answered, it was, when in truth it was only paid for one of them by agreement, such witness ought not to be punished for perjury, because, as the case was, it was no ways material whether it was for one or for both. (2 *Rolle*, 42.) Also it is said to have been resolved, that a witness who swore that one drew his dagger, and beat and wounded *J.* S., when in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. (*Hetley*, 97.) *Hawk. P. C. b.* 1, *c.* 69, *s.* 8.

After stating these authorities, Mr. Sergeant Hawkins observes, that perhaps in all these cases it ought to be intended that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him, through inadvertency, to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly as to the circumstances, and he gave a particular and distinct account of all the circumstances, which afterwards appears to be false, he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. Upon these grounds, the opinion of the judges seems to be very reasonable (1 *Rolle*, 368, *Palmer*, 382), who held a witness to be guilty of perjury, who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw 30 or 40 sheep in the close, and that he knew them to be the defendant's because they were marked with a mark which he knew to be the defendant's, whereas in truth the defendant never used such a mark; for the giving such a special reason for his remembrance, could not but make his testimony the more credible than it would have been without it; and though it signified nothing to the merits of the cause, whether the sheep had any mark or not, yet inasmuch as the assigning such a circumstance, in a thing immaterial, had such a direct tendency to corroborate the evidence concerning what was most material, it was consequently equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue. *Hawk. P. C. b.* 1, *c.* 69, *s.* 8; 2 *Russ. by Grea.* 600.

The vendor of goods having obtained a verdict in an action on a contract, upon proof of the same by bought and sold notes, the purchasers filed a bill in Chancery for a discovery of other parol terms, and for equitable relief from the contract. The answer to the bill denied the existence of the alleged parol terms. On an indictment assigning perjury upon the allegation which contained such denial; it was held by Coleridge, J., that the prayer of the bill being not to enforce the parol terms, but to obtain relief from the contract, the

assignment of perjury was upon a matter material and relevant to the suit in chancery. *R.* v. *Yates*, *Carr.* & *M.* 132.

A question having no general bearing on the matters in issue may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. *R.* v. *Overton*, 2 *Moo. C. C.* 263. *R.* v. *Phillpotts*, 2 *Den. C. C. R.* 302; *S. C.* 21 *L. J. M. C.* 18. In the latter case, the evidence given in respect to which perjury had been assigned was afterwards withdrawn and was inadmissible, but it was held that this could not purge the false swearing; and Maule, J., in the course of the argument said: "Here the defendant, by means of a false oath, endeavours to have a document received in evidence; it is therefore a false oath in a judicial proceeding; it is material to that judicial proceeding, and it is not necessary that it should have been relevant and material to the issue being tried."

The *degree* of materiality is not, as it seems, to be measured. Thus it need not appear that the evidence was sufficient for the party to recover upon, for evidence may be very material, and yet not full enough to prove directly the issue in question. *Rhodes's case*, 2 *Ld. Raym.* 887. So if the evidence was circumstantially material, it is sufficient. *Griepe's case*, 1 *Lord Raym.* 258; 12 *Mod.* 145.

A few cases may be mentioned to illustrate the question of *materiality*. If in an answer to a bill filed by A. for redemption of lands assigned to him by B., the defendant swears that he had *no notice of the assignment*, and insists upon tacking another bond debt due from B. to his mortgage, this is a material fact on which perjury may be assigned. *Pepy's case*, *Peake*, *N. P. C.* 138. In an answer to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement, and upon this denial in his answer, he was indicted for perjury; but Abbott, C. J., held that the denial of an agreement, which by the statute was not binding upon the parties, was wholly immaterial, and the defendant was acquitted. *Dunston's case*, *Ry.* & *Moo. N. P. C.* 109, but see *Bartlett* v. *Pickersgill*, 4 *Burr.* 2255; 4 *East*, 577 (*n*). An indictment for perjury stated that it became a material question, whether *on the occasion of a certain alleged arrest* L. touched K. &c. The defendant's evidence as set out was, "L. put his arms round him and embraced him" innuendo, that L. had *on the occasion to which the said evidence applied* touched the person of K. It was held by the court of king's bench, that the materiality of this evidence did not sufficiently appear. *Nicholl's case*, 1 *B.* & *Ad.* 21. An indictment for perjury stated, that H. L. stood charged by F. W. before T. S. clerk, a justice of the peace, with having committed a trespass, by entering and being in the day-time on certain land in the pursuit of game, on the 12th August, 1843, and that T. S. proceeded to the hearing of the charge, and that upon the hearing of the charge, the defendant C. B. falsely swore that he did not see H. L. during the whole of the said 12th of August, meaning that he the said C. B. did not see the said H. L. at all on the said 12th day of August in the year aforesaid; and that *at the time he the said C. B. swore as aforesaid, it was material and necessary* for the said T. S. so being such justice as aforesaid, to inquire of, and be informed by, the said C. B., whether he the said C. B. did see the said H. L. at all during the said 12th day of August in the year aforesaid. It was held by Alderson, B., that this averment of materiality was insufficient, because, con-

sistently with the averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question, and received this answer. *R.* v. *Bartholomew*, 1 *C. & K.* 366. An indictment for perjury on a charge of bestiality stated, that it was material "to know the state of the said A. B.'s dress at the time the said offence was so charged to be committed as aforesaid;" this was held by the judges to be a sufficient averment of materiality, to allow the prosecutor to show that the flap of his trowsers was not unbuttoned (as sworn by the defendant), and that his trowsers had no flap. *Gardner's case*, 2 *Moo. C. C.* 95. A witness having sworn at a trial that he did not write certain words in the presence of D., it was held that the presence of D. might be a fact as material as the writing of the words and therefore that an assignment of perjury, charging that the defendant did write the words in question in D.'s presence was good. *R.* v. *Schlesinger*, 10 *Q. B.* 670; *S. C.* 17 *L. J. M. C.* 29. Where a plaintiff in an action for goods sold swore falsely in cross-examination that she had never been tried at the Old Bailey, and had never been in custody at the Thames police station, Campbell, C. J., held, on an indictment for perjury, that this evidence was material. *Lavey's case*, 3 *C. & K.* 26.

In order to show the materiality of the deposition or evidence of the defendant, it is essential, where the perjury assigned is in an answer to a bill in equity, to produce and prove the bill, or if the perjury assigned is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court in answer to which the affidavit in question has been made. If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. 2 *Stark. Ev.* 626, *2nd ed.*

In an indictment for perjury, Patteson, J., held that an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. G. upon his oath," was not a good averment of materiality. *Goodfellow's case*, *Carr. & M.* 569.

Proof of the introductory averments.] Where, in order to show the materiality of the matter sworn to, introductory averments have been inserted in the indictment, those averments must be proved. 2 *Russ. by Grea.* 624. Where upon the trial of an indictment containing an assignment of perjury in the following form, "whereas in truth and in fact the said defendant at the time of effecting the said policy, that is to say, a certain policy purporting to have been written by one Kite by his agent, Meyer, on the 13th August, 1807, &c.; (and by other underwriters specified in the indictment) well knew," &c.; and on production of the policy it appeared to have been underwritten by Meyer for Kite on the 15th; Lord Ellenborough was of opinion, that as the prosecutor had chosen to allege a fact, material with reference to the knowledge of the defendant, it was necessary to prove it, and held the variance fatal. *Huck's case*, 1 *Stark. N. P. C.* 523. But see now, as to the power of amendment, 14 & 15 Vict. c. 100, s. 1, *ante* p. 107.

But where the introductory averment is not matter of description, it is sufficient to prove the substance of it, and a variance in other respects will be immaterial. Thus where the indictment averred the

perjury to have been committed in the defendant's answer to a bill of discovery in the exchequer, alleged to have been filed on a day specified, and it appeared that the bill was filed of a preceding term, Lord Ellenborough ruled that the variance was not material; since the day was not alleged as part of the record, and that it was sufficient to prove the bill filed on any other day. *Huck's case*, 1 *Stark. N. P. C.* 521. And where perjury was assigned on an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill. *Waller's case*, 2 *Stark. Ev.* 623. And again in a similar case, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) *and another*, and in fact it was filed against B. C., and D., but the perjury was assigned on a part of the answer which was material between A. and B., Lord Ellenborough held the variance immaterial. *Benson's case*, 2 *Camp.* 509. See also *Baily's case*, 7 *C. & P.* 264. The defendant was tried on an indictment for perjury, committed in giving evidence, as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "whereby his life was greatly despaired of." In the indictment for perjury, the indictment for the assault was introduced in these words, "which indictment was presented in manner and form following, that is to say," and set forth the indictment for the assault at length, and correctly, with the omission of the word "despaired," in the above passage. It was insisted that this was a fatal variance, but the learned judge who tried the case said, that the word *tenor* had so strict and technical a meaning as to make a literal recital necessary, but that by the words "in manner and form following, that is to say," nothing more was requisite than a substantial recital, and that the variance in the present case was only matter of form, and did not vitiate the indictment. *May's case*, 2 *Russ. by Grea.* 626. Where the indictment stated that an *issue* came on to be tried, and it appeared that an information containing several counts, upon each of which issue was joined, came on to be tried, the variance was held immaterial. *Jones's case, Peake, N. P. C.* 37. The defendant was indicted for perjury in an answer to a bill in chancery, which had been amended after the answer put in. To prove the amendments, a witness was called, who stated that the amendments were made by a clerk in the six clerks' office, whose handwriting he knew, and that the clerk wrote the word "amendment" against each alteration. Lord Tenterden was of opinion, that this was sufficient proof of the amendments, but did not think it material to the case. *Laycock's case*, 4 *C. & P.* 326.

Upon an indictment for perjury committed on a trial at the London sittings, the indictment alleged the trial to have taken place before Sir J. Littledale, one of the justices, &c. On producing the record, it did not appear before whom the trial took place, but the *postea* stated it to have been before Sir C. Abbott, C. J., &c. In point of fact, it took place before Mr. Justice Littledale. Lord Tenterden overruled the objection, that this was a variance, saying—on a trial at the assizes, the *postea* states the trial to have taken place before both justices; it is considered in law as before both, though in fact it is before one only; and I am not aware that the *postea* is ever made up here differently, when a judge of the court sits for the chief justice. *R.* v. *Coppard, Moody & Malk.* 118. Where an

indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against B. had been reversed upon error after the bill of indictment against the defendant had been found; it was held by Williams, J., that this was no variance. *R.* v. *Meek*, 9 *C. & P.* 513. An indictment for perjury alleged the trial of an issue before E. S., Esq. sheriff of D., by virtue of a writ directed to the sheriff, the writ of trial put in evidence was directed to the sheriff, and the return was of a trial before him; but it was proved that in fact the trial took place before a deputy, not the under sheriff. This was held to be no variance. *Dunn's case*, 2 *Moo. C. C. R.* 297. See also *R.* v. *Schlesinger*, 10 *Q. B.* 670. Where an indictment for perjury assigned on an affidavit made for the purpose of setting aside a judgment, since the rule of H. T., 4 Wm. 4, alleged, that the judgment was entered up, "*in or as of*" Trinity term, 5 Wm. 4, and the record of the judgment, when produced, was dated "June the 26th, 5 Wm. 4;" Patteson, J., held this to be a variance, and refused to amend under the 9 Geo. 4, c. 15. *Cooke's case*, 7 *C. & P.* 559. An allegation that judgment was "entered up" in an action, is proved by the production of the judgment book from the office in which the incipitur is entered. *R.* v. *Gordon*, *Carr. & M.* 410. On a charge of perjury alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine witnesses; this was held by Coleridge, J., to be a fatal variance, and he would not allow it to be amended. *R.* v. *Hewins*, 9 *C. & P.* 786.

An allegation that the defendant made his warrant of attorney, directed to R. W. and F. B., "then and *still* being attornies" of the K. B., is proved by putting in the warrant. *Ibid.* Where in an indictment for perjury against C. D. it was averred, that a cause was depending between A. B. and C. D.; Lord Denman, C. J., held that a notice of set-off intituled in a cause A. B. against C. D., was not sufficient evidence to support the allegation. *Stoveld's case*, 6 *C. & P.* 489. As to what is not a sufficient examined copy of a bill in chancery, see *R.* v. *Christian*, *Carr. & M.* 388.

An indictment for perjury stated that "in the Whitechapel County Court of Middlesex, holden at, &c., in the county of Middlesex, before J. M. then and there being a judge of the court, a certain action of contract pending in the court between A. L. plaintiff and R. H. defendant came on to be tried" upon which trial A. L. was then and there duly sworn, "before J. M. then and there being judge of the court, and then and there having sufficient and competent authority to administer the oath to A. L. in that behalf;" it was held that it sufficiently appeared that the court in which the action was tried was held in pursuance of 9 & 10 Vict. c. 95. *Lavey* v. *Reg.* 2 *Den. C. C. R.* 504; *S. C.* 21 *L. J. M. C.* 10.

Proof of the falsity of the matter sworn.] Evidence must be given to prove the falsity of the matter sworn to by the defendant; but it is not necessary to prove that all the matters assigned are false; for, if one distinct assignment of perjury be proved, the defendant ought to be found guilty. *Rhodes's case*, 2 *Lord Raym.* 886; 2 *W. Bl.* 790; 2 *Stark. Ev.* 627, 2*d ed.* And where the defendant's oath is as

to his belief only, the averment that he "well knew to the contrary" must be proved. See 2 *Chitty, C. L.* 312; 2 *Russ. by Grea.* 643.

"The first observation on this part of the case is, that the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to show that the party is wilfully perjured; I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection; but I should say that it was not enough to show merely that the statement so made was untrue." *Per Tindal, C. J. Parker's case, Carr. & M.* 639.

An assignment of perjury that the prosecutor did not at the time and place sworn to, *or at any other time or place*, commit bestiality with a donkey (as sworn to) *or with any other animal whatsoever*, is sufficiently proved by the evidence of two witnesses falsifying the deposition which had been sworn to by the defendant. *Gardiner's case*, 2 *Moo. C. C.* 95; *S. C.* 8 *C. & P.* 737.

To convict a person of perjury before a grand jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as *non constat* which of the contradictory statements was the true one. *Per Tindal, C. J., R.* v. *Hughes*, 1 *C. & K.* 519.

Where the prosecutor gave no evidence upon one of several assignments of perjury, Lord Denman refused to allow the defendant to show that the matter was not false. *Hemp's case*, 5 *C. & P.* 468.

F. was indicted for perjury, committed by deposing to an affidavit in a cause, wherein F. was the plaintiff and E. defendant, that E. owed F. 50*l.*; it was held that evidence that the cause was after the making of the affidavit referred by consent, and an award made that E. owed nothing to F., was not admissible in proof of the falsity of the matter sworn. *Fontaine Moreau's case*, 11 *Q. B.* 1028; *S. C.* 17 *L. J. Q. B.* 187. "The decision of the arbitrator," said Denman, C. J., in delivering the judgment of the Court, "is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it in any criminal case."

Where the perjury is alleged to have been committed on a trial in the County Court, it is not necessary that the judge's notes should be produced in order to prove what the prisoner then swore, but the evidence of any person who was present at the trial, and who took notes of what passed, and is able to swear to their accuracy, is sufficient. *Martin's case*, 6 *Cox's C. C.* 107.

Proof of the corrupt intention of the defendant.] Evidence is essential, not only to show that the witness swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge. 2 *Stark. Ev.* 627, *2nd ed.* In this, as in other cases of intent, the jury may infer the motive from the circumstances. *Knill's case*, 5 *B. & A.* 929, (*n*).

There must be proof that the false oath was taken with some degree of deliberation; for if, under all the circumstances of the case, it appears that it was owing to the weakness rather than the perverseness of the party, as where it is occasioned by surprise or inadvertence, or by a mistake with regard to the true state of the question, this would not amount to voluntary and corrupt perjury. *Hawk. P. C. b.* 1, *c.* 69, *s.* 2; 2 *Russ. by Grea.* 597; 4 *Bl. Com.* 137.

Witnesses—number requisite.] It is a general rule, that the testimony of a single witness is insufficient to convict on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict, in a case where there would be merely the oath of one man to be weighed against that of another. 2 *Stark. Ev.* 626, 2*nd ed.*; 2 *Russ. by Grea.* 649; *Hawk. P. C. b.* 1, c. 69; 4 *Bl. Com.* 358. But it is said that this rule must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by the defendant; for, if any other material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *Lee's case*, 2 *Russ. by Grea.* 650. So it is said by Mr. Phillips, that it does not appear to have been laid down that two witnesses are necessary to disprove the fact sworn to by the defendant; nor does that seem to be absolutely requisite; that at least one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced. 1 *Phill. Ev.* 141, 6*th ed.* "There must be something in corroboration which makes the fact sworn to not true if that be true also." *Per Alderson, B.*, in *Boulter's case*, 2 *Den. C. C. R.* 402, *infra.*

A distinction, however, appears to be taken between proving positive allegations in the indictment, and disproving the truth of the matter sworn to by the defendant; the latter, as it is said, requiring the testimony of two witnesses. Thus Mr. Serjeant Hawkins says, that it seems to be agreed that two witnesses are required in proof of the crime of perjury; but the *taking of the oath* and the *facts deposed* may be proved by one witness only. *Hawk. P. C. b.* 2, *c.* 46, *s.* 10. So it is said by Mr. Starkie (citing the above passage from Hawkins), that it seems the *contradiction* must be given by *two direct witnesses*; and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient. He adds, that he had been informed that it had been so held by Lord Tenterden. 2 *Stark. Ev.* 626, (*n*).

In *Champney's case*, 2 *Lew. C. C.* 258, Coleridge, J., said, "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind: indeed Lord Tenterden was of opinion, that two witnesses were necessary to a conviction." See *Mudie's case*, 1 *Moo. & R.* 128. The rule, that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction. *Per Coleridge, J.*, *Yates's case*, *Carr. & M.* 132. Where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment, on the facts contained in the other assignments. *R.* v. *Verrier*, 12 *Ad. & E.* 317; 2 *Russ. by Grea.* 651, (*n*). And it has since been held, by Tindal, C. J., that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. *Parker's case*, *Carr. & M.* 639; *S. C.* 2 *Russ. by Grea.* 654. In *Boulter's case*, 2 *Den. C. C. R.* 396; *S. C.* 21 *L. J. M. C.* 57, perjury was assigned on a statement made by the prisoner, upon a

trial at Nisi Prius, that in June 1851 he owed no more than one quarter's rent to his landlord: the prosecutor swore that the prisoner owed five quarters' rent at that date; and to corroborate the prosecutor's evidence a witness was called, who proved that in August 1850 the prisoner had admitted to him that he then owed his landlord three or four quarters' rent. This was held not to be sufficient corroborative evidence to warrant a conviction, for the money might have been paid intermediately. In a case of perjury on a charge of bestiality, the defendant swore that he saw the prosecutor committing the offence, and saw the flap of his trowsers unbuttoned. To disprove this, the prosecutor deposed that he did not commit the offence, and that his trowsers had no flap; and to confirm him, his brother proved that at the time in question the prosecutor was not out of his presence more than three minutes, and his trowsers had no flap. This was held by Patteson, J., to be sufficient corroborative evidence to go to the jury, who found the defendant guilty. *Gardiner's case*, 2 *Moo. C. C.* 95. A. to prove an alibi for B. had sworn that B. was not out of his sight between the hours of 8 a.m. and 9 a.m. on a certain day, and on this perjury was assigned; Patteson, J., held that evidence by one witness that between those hours A. was at one place on foot, and by another witness that between those hours B. was walking at another place six miles off, was sufficient proof of the assignment of perjury. *Roberts's case*, 2 *C. & K.* 207.

Where a statement by the prisoner himself is given in evidence, contradicting the matter sworn to by him, it has been held not to be necessary to call two witnesses to prove the falsity; one witness, with proof of the admission, being sufficient. The defendant made information, upon oath before a justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob, on account of the price of corn); and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and having been tampered with in their favour, he then swore that they were not at the riot. There was no other evidence on the trial for perjury to prove that the women were in the riot (which was the perjury assigned), but the defendant's information, which was read. The judge thought this evidence sufficient, and the defendant was convicted and transported. *Anon. cor. Yates, and afterwards Lord Mansfield, and Wilmot and Aston, JJ., concurred*, 5 *B. & A.* 939, 940, (*n*); 2 *Russ. by Grea.* 652. So in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas, in that case, only one witness had been adduced to prove the *corpus delicti*, *viz.* the witness who deposed to the contradictory evidence given by the defendant, before the committee of the House of Commons; and further it was insisted, that the mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances showing a corrupt motive, and negativing the probability of any mistake. But the court held, that the evidence was sufficient, the contradiction being by the party himself; and that the jury might infer the motive from the circumstance, and the rule was refused. *Knill's case*, 5 *B. & A.* 929, *note* (*a*.) So where, upon an indictment for perjury, in an affidavit made by the defendant, a solicitor, to

oppose a motion in the court of chancery, to refer his bill of costs for taxation, only one witness was called, and, in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor; upon which it was objected that this was not sufficient, the bill not having been delivered on oath, Denman, C. J., was clearly of opinion, that the bill delivered by the defendant was sufficient evidence, or that even a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness. *Mayhew's case*, 6 *C. & P.* 315. There appears, however, to be an objection to this evidence, which is not easily removed, namely, that there is nothing to show which of the statements made by the defendant is the false one, where no other evidence of the falsity is given. Upon this subject the following observations were made by Holroyd, J.: Although you may believe that, on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict, where it is not possible to tell which is the true and which is the false. *Jackson's case*, 1 *Lewin, C. C.* 270. See also *R.* v. *Hughes, ante*, p. 808. So in *Harris's case*, 5 *B. & A.* 926, the court of K. B. were of opinion (p. 937), that perjury could not be legally assigned by showing contradictory depositions with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. So where the defendant was charged with perjury committed on a trial at the sessions, Gurney, B., held, that a deposition made by the defendant before the magistrate entirely different from what he swore at the trial, was not in itself sufficient proof that the evidence he gave at the sessions was false, but that other confirmatory proof must be adduced to satisfy the jury that he swore falsely at the trial. Strong confirmatory evidence having been given of the truth of the deposition, the defendant was found guilty. *Wheatland's case*, 8 *C. & P.* 238. See the note on this case, 2 *Russ.* by *Grea.* 652.

The following observations on this subject, by an able writer on criminal law, are well deserving of attention. Where depositions, contrary to each other, have been emitted in the same matter by the same person, it may with certainty be concluded that one or the other is false. But it is not relevant to infer perjury in so loose a manner; the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable that the perjury should be specified as existing in one, and the other deposition referred to *in modum probationis*, to make out, along with other circumstances, where the truth really lay. *Alison*,

Princ. Cr. Law of Scot. 475. These remarks are applicable to the cases in our law, in which the evidence of one witness, viz., the party producing the contradictory statement, and the statement itself, have been allowed as sufficient evidence to prove the falsity of the oath. Such statements may be used as strong corroborations of the prosecutor's case, and as such they are admitted in the Scotch law. A party cannot be convicted (says Mr. Alison) of perjury, upon the evidence merely of previous or subsequent declarations emitted by him, inconsistent with what he has sworn; because *in dubio* it must be presumed that what was said under the sanction of an oath was the truth, and the other an error or falsehood, but both such declarations and written evidence under his hand, inconsistent with what he has sworn, form important articles, which, with others, will be sufficient to make the scales of evidence preponderate against him. *Principles of Crim. Law of Scot.* 481.

Statutes relating to perjury.] The principal statutory enactment respecting perjury is the 5 Eliz. c. 9 (the 28 Eliz. c. 1, I.) the operation of which is, however, more confined than that of the common law; and as it does not (see the 5 Eliz. c. 9, s. 13), restrain in any manner the punishment of perjury at common law, it has seldom been the practice to proceed against offenders by indictment under this statute.

By sec. 3, the procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam*, is punishable by the forfeiture of forty pounds.

By sec. 4, offenders not having goods, &c., to the value of forty pounds, are to suffer imprisonment [and stand in the pillory.]

Sec. 5 enacts, that no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within England, Wales, or the marches of the same), until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed, to be first given against them, or any of them, by action or actions, to be sued upon his or their case or cases, according to the course of the common laws of the realm.

Sec. 6, enacts, that if any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall, for his or their said offence, lose and forfeit twenty pounds, and to have imprisonment by the space of six months, without bail or mainprize; and the oath of such person or persons so offending, from thenceforth not to be received in any court of record within this realm of England and Wales, or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said

judgment so reversed to be given against them, or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.

It appears that a person cannot be guilty of perjury within the meaning of this statute, in any case wherein he may not be guilty of subornation of perjury within the same statute, and as the subornation of perjury there mentioned, extends only to subornation "in matters depending in suit by writ, action, bill, plaint, or information, in anywise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c.," no perjury, upon an indictment or criminal information, can bring a man within the statute. *Hawk. P. C. b.* 1, *c.* 69. *s.* 19; *Bac. Ab. Perjury*, (*B*). The statute only extends to perjury by witnesses, and therefore no one comes within the statute by reason of a false oath in an answer to a bill in chancery, or by swearing the peace against another, or in a presentment made by him as homager of a court baron, or for taking a false oath before commissioners appointed by the king. *Hawk. P. C. b.* 1, *c.* 69, *s.* 20. It seems that a false oath taken before the sheriff, on an inquiry of damages, is within the statute. *Id. s.* 22. No false oath is within the statute which does not give some person a just cause of complaint; for otherwise it cannot be said that any person was grieved, hindered, or molested. In every prosecution on the statute, therefore, it is necessary to set forth the record of the cause wherein the perjury complained of is supposed to have been committed, and also to prove at the trial of the cause, that there is actually such a record, by producing it, or a true copy of it, which must agree with that set forth in the pleadings, without any material variance; otherwise it cannot legally appear that there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed. If the action was by more than one, the false oath must appear to have been prejudicial to all the plaintiffs. *Hawk. P. C. b.* 1, *c.* 69, *s.* 23; *Bac. Ab. Perjury*, (*B*). 2 *Russ. by Grea.* 620.

Various provisions for facilitating the punishment of persons guilty of perjury are contained in the 23 Geo. 2, c. 11. By sec. 3, the judges of assize, &c., may direct any witness to be prosecuted for perjury, and may assign counsel, &c. By sections 1 and 2, the indictment in perjury is much simplified, it being made sufficient to set forth the *substance* of the offence charged upon the defendant; and by what court, or before whom the oath was taken (averring such court or person to have a competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, &c., or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed; and so also with regard to indictments for subornation of perjury.

And now the 14 & 15 Vict. c. 100, extends the provisions of the 23 Geo. 2, c. 11, and enacts, by sect. 19, "that it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her majesty's justices, or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder or deputy-recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy-judge of any county court or any court of record, or for any

justices of the peace in special or petty sessions, or for any sheriff, or his lawful deputy, before whom any writ of inquiry, or writ of trial, from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding, made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer, or gaol delivery, for the county, or other district, within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer, or gaol delivery, and that he will there surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed; which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof, the costs of such prosecution shall, and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and where allowed by any such court in Ireland, such sums as shall be allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expences of prosecutions for felonies are now presented for, raised, and levied in Ireland. Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

Sect. 20 enacts, "for every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed."

Sect. 21, enacts: "In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly, to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed,

to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit, and wherever such perjury or other offence aforesaid, shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury."

Sect. 22, enacts, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more, shall be demanded or taken), shall, upon the trial of any indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same."

Punishment.] Perjury is punishable at common law with fine and imprisonment, at the discretion of the court.

By the 2 Geo. 2, c. 25, s. 2 (in Ireland by the 3 Geo. 2, c. 4, made perpetual by the 17 & 18 Geo. 3, c. 36), "the more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury," it is enacted, that "besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper: and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation, before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

By the 3 Geo. 4, c. 114 (the 7 Geo. 4, c. 9, I.), persons guilty of perjury or subornation of perjury, may be sentenced to hard labour.

By the 7 Wm. 4 & 1 Vict. c. 23 (U. K.), the punishment of the pillory is abolished.

Postponing trials for perjury.] It is the practice at the central criminal court not to try an indictment for perjury arising out of a

civil suit, while that suit is in any way undetermined, except in cases where the court in which it is pending postpone the decision of it, in order that the criminal charge may be first disposed of. *Ashburn's case*, 8 *C. & P.* 50.

SUBORNATION OF PERJURY.

Subornation of perjury, at common law, is the procuring a man to take a false oath amounting to perjury, the man actually taking such oath; but if he do not actually take it, the person by whom he was incited is not guilty of subornation of perjury; yet he may be punished by fine and corporal punishment. *Hawk. P. C. b.* 1, *s.* 69, *c.* 10.

Upon an indictment for subornation of perjury, the prosecutor must prove, 1, the inciting by the defendant, and that he knew that the evidence to be given was false; and 2, the taking of the false oath by the witness, &c. See now, 14 & 15 Vict. c. 100, s. 21, *ante*, p. 814.

Proof of the incitement.] The incitement may be proved by calling the party who was suborned. The knowledge of the defendant that the evidence about to be given would be false, will probably appear from the evidence of the indictment, or it may be collected from other circumstances.

Proof of the taking of the false oath.] In general the proof of the perjury will be the same as upon an indictment for perjury, against the witness who perjured himself; and even if the latter has been convicted, it will not, as it seems, be sufficient, against the party who has suborned him, to prove merely the record of the conviction; but the whole evidence must be gone into as upon the former trial. The defendant was indicted for procuring one John Macdaniel to take a false oath. To prove the taking of the oath by Macdaniel, the record of his conviction for perjury was produced. But it was insisted for the defendant, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was correct; that the defendant had a right to controvert the guilt of Macdaniel, and that the evidence given on the trial of the latter ought to be submitted to the consideration of the present jury. The recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. *Reilly's case*, 1 *Leach*, 455. Upon this case Mr. Starkie has made the following observations:—This authority seems at first sight to be inconsistent with that class of cases in which it has been held that, as against an accessary before the fact to a felony, the record of the conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal in procuring, &c., had been indicted as accessary before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected, that this doctrine rests rather upon technical and artificial grounds, than on any clear and satisfactory principle of evidence. 2 *Stark. Ev.* 627, 2*d ed.*

It may also be observed, that the indictment for subornation of perjury does not set forth the *conviction* of the party who took the false oath, but only the preliminary circumstances and the taking of the oath; forming an allegation of the *guilt* of the party, and not of his *conviction;* and in *Turner's case*, 1 *Moo. C. C.* 347, *ante*, p. 53, the judges expressed a doubt whether, if an indictment against a receiver stated, not the *conviction*, but the *guilt* of the principal felon, the record of the conviction of the principal would be sufficient evidence of the guilt.

PIRACY.

Offence at common law.] The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to felony there; though it was no felony at common law. 2 *East, P. C.* 796; 4 *Bl. Com.* 72; *Hawk. P. C. c.* 37, *s.* 4. Before the 28 Hen. 8, c. 15, the offence was only punishable by the civil law, and that statute does not render it a felony. By other statutes, however, which will be presently noticed, the offence is made felony, and the nature of the offence which shall constitute piracy is specifically described.

"The offence of piracy at common law is nothing more than robbery upon the high seas; but by statutes passed at various times, and still in force, many artificial offences have been created, which are to be deemed to amount to piracy." *Report of Comm. of Crim. Law.*

Stat. 11 *&* 12 *Wm.* 3, *c.* 7.] By the 11 & 12 Wm. 3, c. 7 (E.), s. 8, "if any of his majesty's natural born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility against others, his majesty's subjects upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender or offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers, &c."

By s. 9, "if any commander, or master of any ship, or any seaman or mariner, shall in any place where the admiral has jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his, or their, ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandise, or yield them up voluntarily to any pirate; or shall bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with

or attempt, or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or run away with any ship, goods, or merchandise, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make, or endeavour to make, a revolt in his ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber [and suffer death," &c.]

Upon the above section (9) of the 11 & 12 Wm. 3, c. 7, it has been decided by the twelve judges, that the making, or endeavouring to make, a revolt on board a ship, with a view to procure a redress of what the prisoners may think grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within the statute. *Hasting's case*, 1 *Moo. C. C.* 82.

Stat. 8 *Geo.* 1, *c.* 24.] By the 8 Geo. 1, c. 24, (E.) s. 1, "in case any person or persons belonging to any ship, or vessel whatsoever, upon meeting any merchant ship, or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard, or destroy any part of the goods or merchandise belonging to such ship or vessel, the person or persons guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid."

And by the same section, "if any commander or master of any ship or vessel, or any other person or persons shall anywise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with any pirate, felon, or robber upon the seas: or if any person or persons shall anyways consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of such piracy, felony, or robbery, every such offender shall be deemed and adjudged guilty of piracy, felony, and robbery."

Statute 18 *Geo.* 2, *c.* 30.] By the 18 Geo. 2, c. 30, (E.) all persons being natural born subjects or denizens of his majesty, who, during any war, shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, against his majesty's subjects, by virtue or under colour of any commission from any of his majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his majesty's enemies upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, &c., may be tried as pirates, felons, and robbers in the court of admiralty, in the same manner as pirates, &c., are by the said act (11 & 12 Wm. 3,) directed to be tried, [and shall suffer death.]

Under this statute it has been held, that persons *adhering to the king's enemies*, by cruising in their ships, may be tried as *pirates* under the usual commission granted by virtue of the statute 28 Hen. 8. *Evans's case*, 2 *East*, *P. C.* 798.

Stat. 32, *Geo.* 2, *c.* 25.] By the 32 Geo. 2, c. 25, s. 12, in case any commander of a private ship or vessel of war, duly commissioned by the 29 Geo. 2, c. 34, or by that act, shall agree with any commander

or other person belonging to any neutral or other ship or vessel (except those of his majesty's declared enemies) for the ransom of any such neutral or other ship or vessel, or cargo, after the same has been taken as a prize, and shall, in pursuance of such agreement, quit, set at liberty, or discharge any such prize, instead of bringing it into some port of his majesty's dominions, such offender shall be deemed and adjudged guilty of piracy, felony, and robbery, and shall suffer death. See *stat.* 22 *Geo.* 3, *c.* 25, *and* 2 *East, P. C.* 801.

Stat. 5 *Geo.* 4, *c.* 113—*dealing in slaves.*] By the 5 Geo. 4, c. 113, (U. K.) s. 9, the carrying away, conveying, or removing, of any person upon the high seas for the purpose of his being imported or brought into any place as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose, is made piracy, felony, and robbery, punishable with death. By sec. 10, the dealing in slaves, and other offences connected therewith, are made felony.

Now by the 7 Wm. 4 & 1 Vict. c. 91, (U. K.) the punishment of death, imposed by the ninth section of the above statute, is abolished, and transportation for life, &c., substituted.

The provisions of the statute 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places which do not form part of the British dominions. *Per Maule and Wightman, JJ., R.* v. *Zulueta*, 1 *C. & K.* 215. In order to convict a party who is charged with having employed a vessel for the purpose of slave trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of that adventure. *Ibid.*

On the 26th February, 1845, the Felicidade, a Brazilian schooner, fitted up as a slaver, surrendered to the armed boats of her majesty's ship Wasp. She had no slaves on board. The captain and all his crew, except Majaval and three others, were taken out of her and put on board the Wasp. On the 27th February, the three others were taken out and put on board the Wasp also. Cerqueira, the captain, was sent back to the Felicidade, which was then manned with sixteen British seamen, and placed under the command of lieutenant Stupart. The lieutenant was directed to steer in pursuit of a vessel seen from the Wasp, which eventually turned out to be the Echo, a Brazilian brigantine, having slaves on board, and commanded by Serva, one of the prisoners. After a chase of two days and nights, the Echo surrendered, and was then taken possession of by Mr. Palmer, a midshipman, who went on board her, and sent Serva and eleven of the crew of the Echo to the Felicidade. The next morning lieutenant Stupart took command of the Echo, and placed Mr. Palmer and nine British seamen on board the Felicidade in charge of her and the prisoners. The prisoners shortly after rose on Mr. Palmer and his crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners were brought to this country, and tried at Exeter for murder. The jury found them guilty. The foundation of the conviction pursuant to the summing up of the learned baron (Platt), who tried the case, was, that the Felicidade was in the lawful custody of her majesty's officers, that all on board that vessel were within her majesty's admiralty jurisdiction; and that the jury

should find the prisoners guilty of murder, if satisfied by the evidence that they plotted together to slay all the English on board, and run away with the vessel; that, in carrying their design into execution, Majaval slew Mr. Palmer, by stabbing him and throwing him overboard, and that the other prisoners were present, aiding and assisting Majaval in the commission of the murder. On a case reserved for the opinion of the judges, objections to these points were argued by the counsel for the prisoners, and the conviction was held to be wrong. *Reg.* v. *Serva and others*, 1 *Den. C. C. R.* 104.

Proof of the piracy.] The prosecutor must give evidence of facts, which, had the transaction occurred within the body of a county, would have rendered the offender guilty of larceny or robbery at common law. He must, therefore, show a taking *animo furandi* and *lucri causâ.* It is said that if a ship is attacked by a pirate, and the master, for her redemption, gives his oath to pay a certain sum, though there is no taking, yet it is piracy by the law marine, but by the common law there must be an actual taking, though but to the value of a penny, as in robbery. 1 *Beawes, Lex Merc.* 25, citing 44 *Ed.* 3, 14, 4 *Hen.* 4. If a ship is riding at anchor, with part of the marines in her boat, and the rest on shore, so that none remain in the ship, if she be attacked and robbed, it is piracy. 1 *Beawes, Lex Merc.* 253, citing 14 *Edw.* 3, 115.

Proof with regard to the persons guilty of piracy.] The subject of a foreign power in amity with this country may be punished for piracy committed upon English property. 1 *Beawes, Lex Merc.* 251. A person having a special trust of goods will not be guilty of piracy by converting them to his own use; as where the master of a vessel with goods on board, ran the goods on shore in England, and burnt the ship with intent to defraud the owners and insurers, on an indictment for piracy and stealing the goods, it was held to be only a breach of trust, and no felony, and that it could not be piracy to convert the goods in a fraudulent manner, until the special trust was determined. *Mason's case*, 2 *East, P. C.* 796: *Mod.* 74. But it is otherwise with regard to the mariners. Thus where several seamen on board a ship seized the captain, he not agreeing with them, and after putting him ashore, carried away the ship, and subsequently committed several piracies, it was held that this force upon the captain, and carrying away the ship, was piracy. *Maye's case*, 2 *East, P. C.* 796. The prisoners were convicted upon a count charging them with feloniously and piratically stealing sixty-five fathoms of cable &c., upon the high seas, within the jurisdiction of the admiralty. It appeared that they were Deal pilots, who having been applied to by the master to take the vessel into Ramsgate, had in collusion with him, cut away the cable and part of the anchor, which had before been broken, for the purpose of causing an average loss to the underwriters. It was objected that the offence of the prisoners was not larceny, having been committed by them jointly with the master of the vessel, not for the purpose of defrauding the owners, but for the purpose of defrauding the underwriters for the benefit of the owners. A majority of the judges, however, held the conviction right. *Curling's case, Russ. & Ry.* 123.

Proof with regard to accessaries.] Accessaries to piracy were triable only by the civil law, and if their offence was committed on land, they

were not punishable at all before the 11 & 12 Wm. 3, c. 7, s. 10. And now by the 8 Geo. 1, c. 24, s. 3, all persons whatsoever, who, by the 11 & 12 Wm. 3, c. 7, are declared to be accessary or accessaries to any piracy or robbery therein mentioned, are declared to be principal pirates, felons, and robbers, and shall be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may, according to that statute, and shall suffer death in like manner as pirates, &c.

The knowingly abetting a pirate, within the body of a county, is not triable at common law. *Admiralty case*, 13 *Rep.* 53.

Venue and trial.] The decisions with respect to the venue for offences committed on the high seas have been stated, *ante*, p. 250.

By the 46 Geo. 3, c. 54, all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm; and for offences committed upon the land within this realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor, &c., shall from time to time think fit to appoint, The commissioners are to have the same powers as commissioners under the 28 Hen. 8.

Punishment under the 7 *Wm.* 4 *and* 1 *Vict. c.* 88.] By the 7 Wm. 4 and 1 Vict. c. 88, (U. K.) so much of the 28 H. 8, c. 15, the 11 & 12 Wm. 3, c. 7; the 4 Geo. 1, c. 11, s. 7; the 8 Geo. 1, c. 24; and the 18 Geo. 2, c. 30, as relate "to the punishment of the crime of piracy, or of any offence, by any of the said acts, declared to be piracy, or of accessaries thereto respectively," are repealed.

By s. 2, "whosoever with intent to commit, or at the time of or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault with intent to murder, any person being on board of, or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony and being convicted thereof, shall suffer death as a felon."

By s. 3, "whosoever shall be convicted of any offence, which by any of the acts hereinbefore referred to, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 4, "in the case of every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree, is by this act punishable, and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

By s. 5, in cases of imprisonment the court may award hard labour, and solitary confinement not exceeding one month at any one time, and three months in any one year.

POST-OFFICE—OFFENCES RELATING TO.

Statute 7 Wm. 4 and 1 Vict. c. 36.] The law with regard to the embezzlement of letters by persons employed in the post-office was formerly contained in the 5 Geo. 3, c. 25, s. 17, 7 Geo. 3, c. 50, s. 1, & 42. Geo. 3. c. 81, s. 1. The provisions of those acts were afterwards consolidated in the 52 Geo. 3, *c.* 143.

By the 7 Wm. 4 and 1 Vict. c. 32, (U. K.) the last mentioned statute and all other enactments relative to offences committed against the post-office (excepting so much of the 5 Geo. 3, c. 25, and the 7 Geo. 3, c. 50, as respectively relate to any felony or other offence committed within the British dominions in America and the West Indies) were repealed, and the law was consolidated and further provisions made, by the 7 Wm. 4 and 1 Vict. c. 36, (U. K.) which came into operation on the same day as the 7 Wm. 4 and 1 Vict. c. 32.

Offences by officers employed under the post-office—opening or detaining letters.] By the 7 Wm. 4 and 1 Vict. c. 36, (U. K.) s. 25,

"every person employed by or under the post-office who shall contrary to his duty open or procure or suffer or be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet; provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same; or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the lord lieutenant of Ireland."

Offences by officers employed in the post-office—stealing, embezzling, secreting, or destroying letters.] By sect. 26, "every person employed under the post office who shall steal, or shall for any purpose whatever, embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted, or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

What is a post letter.] Under the 26th section, it has been held, that where an inspector secretly put a letter, prepared for the purpose, containing a sovereign, amongst some letters, which a letter-carrier suspected of dishonesty was about to sort, and the letter-carrier stole the letter and sovereign, that he was not rightly convicted of stealing *a post letter*, such letter not having been put in the post in the ordinary way, but was rightly convicted of larceny of the sovereign, laid as the property of the postmaster-general. *Rathbone's case*, 2 *Moo. C. C.* 242. To make a man liable under this section, the letter must have come into his hands in the ordinary course of the post-office. *Shepherd's case*, 25 *L. J. M. C.* 52. See also *Gardener's case*, 1 *C. & K.* 628. The president of a department in the post-office put a half-sovereign into a letter, on which he wrote a fictitious address, and dropped the letter with the money in it into the letter box of a post-office receiving house where the prisoner was employed in the service of the post-office. It was held that this was a stealing of a post letter containing money, within the statute, and that this was not the less a "post letter" within that enactment, because it had a fictitious address. *Young's case*, 1 *Den. C. C. R.* 194. Where a person took a money letter to the post-office which was at an inn, and did not put it into the letter box, but laid the letter and the money to prepay it upon a table in the passage of the inn, in which passage the letter box was, telling the prisoner, a female servant, who was not authorised to receive letters, who said she would "give it to them," but who, instead of doing so stole the letter and its contents; Patteson, J., held that this was not a "post letter" within the meaning of the statute. *Harley's case*, 1 *C. & K.* 89.

A servant being sent with a letter, and a penny to prepay the postage at a receiving house, found the door shut; and in consequence put the penny inside the letter, and fastened it in by the means of a pin, and then put the letter into the unpaid letter box. A messenger in the general post-office stole this letter with the penny in it. It was held by Lord Denman, C. J., that he might be convicted of stealing a post letter containing money, although the money was not put into the letter for the purpose of being conveyed by means of it to the person to whom it was addressed. *Mence's case, Carr. & M.* 234.

Offences by officers employed in the post-office—stealing or embezzling printed votes, newspapers, &c.] By sect 32, "for the protection of printed votes and proceedings in parliament and printed newspapers," it is enacted, that "every person employed in the post-office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet."

Proof of being employed by or under the post-office.] The employment of the offender "by or under the post-office" must be proved. It is not necessary in these cases to produce the actual appointment of the prisoner, it is sufficient to show that he acted in the capacity imputed to him. *Borrett's case*, 6 *C. & P.* 124; *Ree's case, Id.* 606. The prisoner was indicted on the 7 Geo. 3, s. 50, (which stated the special capacities of the parties employed in the post-office), in the first and third counts, as "a person employed in sorting and charging letters in the post-office," in the second and fourth counts, as "a person employed in the business relating to the general post-office;" it appeared that he was only a sorter and not a charger, and he was convicted on the second and fourth counts only. It was objected that as he was acquitted on the counts charging him as a sorter and charger, and it was not proved that he was employed in any other capacity than that of a sorter, he ought not to have been convicted on the second and fourth counts. The judges thought the objection valid, but were inclined to be of opinion that the prisoner might have been properly convicted upon the first and third counts by a special finding that he was a sorter only. *Shaw's case*, 2 *East, P. C.* 580; 2 *W. Bl.* 789; 1 *Leach*, 79. In a subsequent case where the prisoner was described as a post-boy and rider, and was proved to be only a post-boy, being convicted, the judges held the conviction right, saying that a post-boy riding on horseback was a rider as well as a post-boy. *Ellins's case, Russ. & Ry.* 188. A person employed at a receiving house of the general post-office to clean boots, &c., and who occasionally assisted in tying up the letter-bags, was held not to be a person employed by the post-office within the 52nd Geo. 3, c. 143, s. 2. *Pearson's case*, 4 *C. & P.* 572. S. delivered two 5*l.* notes to Mrs. D., the wife of the postmaster of C., at which post-office money orders were not granted, and asked her to send them by G., the letter carrier from C. to W., in order that he might get two 5*l.* money

orders for them at the W. post-office. Mrs. D. gave these instructions to G., and put the notes by his desire into his bag. G. afterwards took the notes out of the bag, and pretended when he got to the W. post-office that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D. It was held that the notes were not in G's possession in the course of his duty as a post-office servant. *Glass's case*, 1 *Den. C. C. R.* 215. The prisoner was employed to carry letters from C. A. to F., such employment being complete upon the delivery of the letters at F. Upon one occasion, at the request of the post-master at F., the prisoner assisted in sorting the letters at that place, and whilst so engaged, stole one of the letters containing money. It was held by the court of criminal appeal, that the prisoner was a person "employed under the post-office," within the 1 Vict. c. 36, s. 26. *Reason's case*, 1 *Dears. C. C. R.* 226. Coleridge, J., distinguished *Glass's case*, which had been relied on by the prisoner's counsel, observing that in that case, "it was not the business of the post-master to get money orders." So the post-mistress of G. received from A. a letter unsealed but addressed to B., and with it 1*l.* for a post-office order, 3*d.* for the poundage on the order, 1*d.* for the postage, and 1*d.* for the person who got the order. S. gave the letter unsealed and the money to the prisoner, who was the letter-carrier from G. to L., telling him to get the order at L., and enclose it in the letter, and post the letter at L. The prisoner destroyed the letter, never procured the order, and kept the money. Cresswell, J., held that he was indictable under s. 26 of the statute of 1 Vict. c. 36., he being at the time in the employment of the post-office. *Bickerstaff's case*, 2 *C. & K.* 761.

Where the prisoner was employed by a post-mistress to carry letters from D. to B., at a weekly salary paid him by the post-mistress, which was repaid to her by the post-office, it was held that he was a person employed by the post-office within the 52 Geo. 3, c. 143, s. 2. *Salisbury's case*, 5 *C. & P.* 155. In the above case, Patteson, J., was inclined to think that the words "whilst employed," in the second section, merely meant that the party should be then in the employ of the post-office, and not that the letter stolen should be in the party's hands in the course of his duty. *Ibid.*

Where a prisoner was a letter-carrier employed by the post-office to deliver letters about Gloucester, and had been in the habit of calling at the lodge of the Gloucester infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the Gloucester post-office; but he sometimes omitted to call at the lodge, and then the letters were taken by some person and put in the post-office; and during the time the prisoner had been ill, another person who performed these duties had also called at the lodge, and received the letters and the pennies and delivered them at the post-office in the same way as the prisoner. Evidence was also given to show that the prisoner had embezzled pence received at the lodge to prepay letters. It was admitted, that proof that the prisoner acted as a letter-carrier, was sufficient to show that he held that situation, but it was urged that where the charge was of embezzling money received by virtue of his employment, it must be shown that it was the duty of the prisoner to receive the money, and in this case it was his mere voluntary act, and he was neither bound to go to the lodge nor to receive the letters; but it was held by Coleridge, J., that there was evidence to go to the jury, that

the pence were received by virtue of the prisoner's employment. *Townsend's case, Carr. & M.* 178.

Proof of opening or detaining letters.] It must be proved that the defendant opened or detained a letter according to the allegation in the indictment. In answer to the charge, the defendant may show any of the circumstances mentioned in the proviso to the 25th section, which authorise him to open or detain the letter.

Proof of stealing, embezzling, secreting, or destroying letters.] Prove a larceny of a letter, or of a letter containing money, &c., as the case may be. The ownership of the property need not be proved, but may be laid in the postmaster-general; neither need it be shown to be of any value. To bring the case within the statute the letter must be a "post-letter." As to what is to be considered a "post-letter," and what a delivery to the post-office, see the interpretation clause, *post.*

Where the charge is for embezzling, &c., the prosecutor must prove that the prisoner either embezzled, secreted, or destroyed the letter described. Where the prisoner secreted half a bank-note on one day, and the other half on another day, it was held to be a secreting of the note within the 7 Geo. 3, c. 50. The doubt was, whether *secreting* in the statute did not mean the *original* secreting, as taking does; but the judges distinguished between taking and secreting, for after the prisoner had got possession of the second letter he secreted both. *Moore's case,* 2 *East, P. C.* 582. The stat. 52 Geo. 3, mentioned "any part of any bill," &c. The secreting will be proved in general by circumstantial evidence.

A person employed in the post-office committed a mistake in the sorting of two letters containing money, and he threw the letters unopened, and the money, down a water-closet in order to avoid a penalty attached to such mistakes. It was held that this was a larceny of the letters and money, and also a secreting of the letters within 1 Vict. c. 36. s. 26. *Wynn's case,* 1 *Den. C. C. R.* 365; *S. C.* 18. *L. J. M. C.* 51.

Where such is the charge, it must appear that the letter contained some chattel, money, or valuable security. Where the letter embezzled was described as containing several notes, it was held sufficient to prove that it contained any one of them, the allegation not being descriptive of the letter, but of the offence. *Ellins's case, Russ. & R.* 188. It is not necessary to prove the execution of the instruments which the letter is proved to contain. *Ibid.* Country bank-notes paid in London, and not re-issued, were held within the 7 Geo. 3. They were said to be valuable to the possessors of them, and available against the makers of them, and fell within both the words and meaning of the act. *Ransom's case, Russ. & Ry.* 232; 2 *Leach,* 1090; *acc. West's case,* (Nov. 15, 1856,) 5 *Weekly Rep.* 50. Upon an indictment under the 7 Geo. 3, it was held that a bill of exchange might be described as a warrant for the payment of money, as in cases of forgery. *Willoughby's case,* 2 *East, P. C.* 581. A post-office order for the payment of money in the ordinary form, is a warrant and order for the payment of money, and may be so described in an indictment for larceny. *Gilchrist's case,* 2 *M. C. C.* 233. Neither the former statutes nor the 52 Geo. 3, contained the word "coin" or "money." The prisoner was indicted under the former statutes for stealing 5*s.* 3*d.* in gold coin (being a sorter in the post-

office,) and it was objected that as the letters contained *money*, and not securities for money, the case was not within the acts, and the court (at the Old Bailey) being of this opinion, the prisoner was acquitted. *Skutt's case*, 2 *East, P. C.* 592. The security specified in the statute must be valid and available, and therefore a draft purporting to be drawn in London, but drawn in Maidstone, and having no stamp upon it pursuant to the 31 Geo. 3, c. 25, was held not to be a draft within the 7 Geo. 3, c. 50. *Pooley's case, Russ. & Ry.* 12; 2 *Leach*, 887; 3 *Bos. & Pul.* 311.

It seems that the contents of the letter secreted, &c., will not be evidence as against the prisoner to prove that the letter contained the valuable security mentioned in it. *Plumer's case, Russ. & Ry.* 264. The letter in question had marked upon it, "paid 2*s*.," which was the rate of double postage. This was written by the clerk of the writer of the letter, who had paid the postage, but was not called. There being no other proof of the double postage, the judges held the conviction wrong. *Plumer's case, Russ. & Ry.* 264.

The prisoner having been indicted under the 5 Geo. 3 & 7 Geo. 3, c. 50, s. 3, the jury found specially that he was a person employed by the post-office in stamping and facing letters, and that he secreted a letter which came into his hands by virtue of his office, containing a 10*l*. note, but that he did not open the same, nor know that the bank note was contained therein, but that he secreted it with intent to defraud the king of the postage, which had been paid. The prisoner, it is said, remained in prison several years, but no judgment appears to have been given. *Sloper's case*, 2 *East, P. C.* 583; 1 *Leach*, 81.

Offences by other parties—stealing money or valuable securities out of letters.] By the 7 Wm. 4 & 1 Vict. c. 36, 1. 27, "every person who shall steal from or out of a post letter any chattel, or money, or valuable security, shall in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

Although it was held, that a person in the employ of the post-office was not within the *second* section of the 52 Geo. 3, c. 143, yet such a person might be indicted, and convicted under the *third* section for stealing a letter. *Brown's case, Russ. & Ry.* 32 (*n*); *Salisbury's case*, 5 *C. & P.* 155.

Offences by other parties—stealing letter-bags and letters sent by the mail, &c.] By the 7 Wm. 4 & 1 Vict. c. 36, s. 28, "every person who shall steal a post letter-bag, or a post letter from a post letter-bag, or shall steal a post letter from a post-office, or from an officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and shall be transported beyond the seas for life."

Where the prisoner, with intent to steal the mail bags, pretended to be the guard, and procured them to be let down to him from the window by a string, and carried them away; being indicted on the 7 Geo. 3, and found guilty, all the judges held the conviction right, on a count for stealing the letters out of the post-office; for his artifice in obtaining the delivery of them in the bag out of the house, was the same as if he had actually taken them out himself. *Pearce's case*, 2 *East, P. C.* 603. Upon the same stat. (7 Geo. 3), it was

held, that a letter-carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, could not be indicted for stealing such letters. *Howard's case*, 2 *East, P. C.* 604.

The above statute made it an offence to steal from the *possession* (not from the *person*) of persons employed to convey letters, &c. Therefore, where a mail-rider, after fixing the portmanteau containing the letters on his horse, fastened his horse at the post-office, and went to a house about thirty yards distant for his great coat, and in the meantime the prisoner came and stole the letters, it was held by Wood, B., that the case was within the statute, for that the letters had been in the possession of the mail-rider, and that possession had never been abandoned. *Robinson's case*, 2 *Stark. N. P. C.* 485.

With regard to what was to be considered a "post-office" within the above statute, it was held that a "receiving-house" was not such, but such house was "a place for the receipt of letters" within the act; and, if a shop, the whole shop was to be considered as "a place for the receipt of letters," and therefore, the putting of a letter on the shop counter, or giving it to a person belonging to the shop, was a putting into the post. *Pearson's case*, 4 *C. & P.* 572. To complete the offence under the 4th section of the 52 Geo. 3, c. 143, of stealing a letter from the place of receipt, it was held, that the letter should be carried wholly out of the shop, and, therefore, if a person opened a letter in the shop, and there stole the contents, without taking the letter out of the shop, the case was not within the statute. *Pearson's case, suprà.* See *Harley's case, ante*, p. 824.

Offences by other parties—stealing, &c. letter-bags and letters sent by a post-office packet.] By the 7 Wm. 4 & 1 Vict. c. 36, s. 29, "every person who shall steal or unlawfully take away a post letter-bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years."

Offences by other parties—fraudulently retaining letters, &c.] By sect. 31, reciting that "post letters are sometimes by mistake delivered to the wrong person, and post letters and post letter-bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward;" it is enacted, "that every person who shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or being required to deliver up by an officer of the post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter-bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment."

This enactment was passed to meet *Mucklow's case, ante*, p. 585.

Offences by other parties—forging the name or handwriting of the receiver-general, &c. of the post-office.] By sect. 33, "every person

who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, the name or handwriting of the receiver-general for the time being of the general post-office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the hands or custody of the governor and company of the bank of England or Ireland on account of the receiver-general of the post-office, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any draft, warrant, or order of such receiver-general, or of any person employed by or under him, for money or for payment of money, with intend to defraud any person whomsoever, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for life."

Offences by other parties—forging or altering franks.] By sect. 34, "every person who shall forge or counterfeit the handwriting of another person in the superscription of a post letter, or who shall alter or change upon a post letter the superscription thereof, or who shall write or send by the post, or cause to be written or sent by the post, a letter the superscription whereof in whole or in part shall be forged or counterfeited, or altered, knowing the same to be forged, counterfeited, or altered, with intent, in either of those cases, to avoid the payment of the duty of postage, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be transported beyond the seas for the term of seven years."

The privilege of franking, however, was abolished under the provisions of the 2 & 3 Vict. c. 52.

Accessaries and procurers.] By the 7 Wm. 4 & 1 Vict. c. 36, s. 35 it is enacted, "that in the case of every felony punishable under the post-office acts, every principal in the second degree, and every accessary before the fact, shall be punishable in the same manner as the principal in the first degree is by the post-office acts punishable; and every accessary after the fact to any felony punishable under the post-office acts (except only a receiver of any property or thing stolen, taken, embezzled, or secreted,) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the post-office acts, shall be liable to be indicted and punished as a principal offender." See also s. 37, *infra.*

And by sect. 36, "every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the post-office acts, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

Receivers.] By sect. 30, "with regard to receivers of property sent by the post and stolen therefrom," it is enacted, "that every person who shall receive any post letter or post letter-bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the post-office acts, knowing the same to have been feloniously stolen, taken, embezzled,

or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessary after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every receiver, howsoever convicted, shall be liable to be transported beyond the seas for life."

Venue.] By sec. 37, "the offence of every offender against the post-office acts may be dealt with, and indicted and tried and punished, and laid and charged to have been committed in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place, and if committed in Scotland either in the high court of justiciary at Edinburgh or in the circuit court of justiciary to be holden by the lords commissioners of justiciary within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody, as if his offence had been actually committed there; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag or post letter, or in respect of a post letter-bag, or post letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter bag or the post letter, or the chattel, or the money, or the valuable security sent by the post in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessary before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

By sec. 39, "where an offence punishable under the post-office acts shall be committed within the jurisdiction of the admiralty, the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction."

Property may be laid in the postmaster-general, &c.] By sec. 40,

"in every case where an offence shall be committed in respect of a post letter-bag or a post letter, or a chattel, money, or a valuable security, sent by the post, it shall be lawful to lay in the indictment or criminal letters to be preferred against the offender the property of the post letter-bag or of the post letter, or chattel or money, or the valuable security sent by the post, in the postmaster-general; and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the post letter bag or any such post letter or valuable security was of any value; and in any indictment or any criminal letters to be preferred against any person employed under the post-office for any offence committed against the post-office acts, it shall be lawful to state and allege that such offender was employed under the post-office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment."

Punishment.] By sect. 41, "every person convicted of any offence for which the punishment of transportation for life is herein awarded shall be liable to be transported beyond the seas for life or for any term not less than seven years, to be imprisoned for any term not exceeding four years; and every person convicted of any offence punishable according to the post-office acts by transportation for fourteen years shall be liable to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years."

By sect. 42, "where a person shall be convicted of an offence punishable under the post-office acts for which imprisonment may be awarded the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and may also direct that he shall be kept in solitary confinement for the whole or any portion of such imprisonment, as to the court shall seem meet."

Interpretation clause.] By sect. 47, "for the interpretation of the post-office laws," it is enacted, "that the following terms and expressions shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found; (that is to say), the term "British letter" shall mean a letter transmitted within the United Kingdom; and the term "British newspapers" shall mean newspapers printed and published in the United Kingdom liable to the stamp duty and duly stamped; and the term "British postage" shall mean the duty chargeable on letters transmitted by post from place to place within the United Kingdom, or if transmitted to or from the United Kingdom, chargeable for the distance which they shall be transmitted within the United Kingdom, and including also the packet postage, if any; and the term "colonial letter" shall mean a letter transmitted between any of her Majesty's colonies and the United Kingdom; and the term "colonial newspapers" shall mean newspapers printed and published in any of her Majesty's dominions out of the United Kingdom; and the term "convention posts" shall mean posts established by the postmaster-general under agreements with the inhabitants of any places; and the term "double letter" shall mean a letter having one inclosure; and the term "double postage" shall mean twice the amount of single postage; and the term "East Indies" shall mean every port and place within

the territorial acquisitions now vested in the East India Company in trust for her Majesty, and every other port or place within the limits of the charter of the said company (China excepted), and shall also include the Cape of Good Hope; and the term "express" shall mean every kind of conveyance employed to carry letters on behalf of the post-office other than the usual mail; and the term "foreign country" shall mean any country, state, or kingdom, not included in the dominions of her Majesty; and the term "foreign letter" shall mean a letter transmitted to or from a foreign country; and the term "foreign newspapers" shall mean newspapers printed and published in a foreign country in the language of that country; and the term "foreign postage" shall mean the duty charged for the conveyance of letters within such foreign country; and the term "franking officer" shall mean the person appointed to frank the official correspondence of offices to which the privilege of franking is granted; and the term "her Majesty" shall mean "her Majesty, her heirs, and successors;" and the term "her Majesty's colonies" shall include every port and place within the territorial acquisitions now vested in the East India Company in trust for her majesty, the Cape of Good Hope, the Islands of Saint Helena, Guernsey, Jersey, and the Isle of Man, (unless any such places be expressly excepted), as well as her Majesty's other colonies and possessions beyond seas; and the term "inland postage" shall mean the duty charged for the transmission of post letters within the limits of the United Kingdom, or within the limits of any colony; and the term "letter" shall include packet, and the term "packet" shall include letter; and the expression "lord lieutenant of Ireland" shall mean the chief governor or governors of Ireland for the time being; and the expression "lords of the treasury" shall mean the lord high treasurer of the United Kingdom of Great Britain and Ireland, or the lords commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland, or any three or more of them; and the term "mail" shall include every conveyance by which post letters are carried, whether it be a coach, or cart, or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term packet boat; and the term "mail bag" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; and the term "master of a vessel" shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war or other vessel; and the expression "officer of the post-office" shall include the postmaster-general, and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office; and the term "packet postage" shall mean the postage chargeable for the transmission of letters by packet boats between Great Britain and Ireland, or between the United Kingdom and any of her Majesty's colonies, or between the United Kingdom and foreign countries; and the term "packet letter" shall mean a letter transmitted by a packet boat; and the term "penalty" shall include every pecuniary penalty or forfeiture; and the expression "persons employed by or under the post-office" shall include every person employed in any business of the post-office according to the interpretation given to the officer of the post-office; and the terms "packet boats" and "post-office packets" shall include

vessels employed by or under the post-office or the admiralty for the transmission of post letters, and also ships or vessels (though not regularly employed as packet boats) for the conveyance of post letters under contract, and also a ship of war or other vessel in the service of her majesty, in respect of letters conveyed by it; and the term "postage" shall mean the duty chargeable for the transmission of post letters: and the term "post town" shall mean a town where a post-office is established (not being a penny, or twopenny, or convention post-office); and the term "post letter bag" shall include a mail bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters; and the term "post letter" shall mean any letter or packet transmitted by the post under the authority of the postmaster-general, and a letter shall be deemed a post letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter carrier or other person authorised to receive letters for the post shall be a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorised to receive the letter according to the usual manner of delivering that person's letter, shall be a delivery to the person addressed; and the term "post-office" shall mean any house, building, room, or place, where post letters are received or delivered, or in which they are sorted, made up, or despatched; and the term postmaster-general shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her Majesty; and the terms "post-office acts" and "post-office laws" shall mean all acts relating to the management of the post, or to the establishment of the post-office, or to postage duties from time to time in force; and the term "ships" shall include vessels other than packet boats; and the term "single postage" shall mean the postage chargeable for a single letter; and the term "single letter" shall mean a letter consisting of one sheet or piece of paper, and under the weight of an ounce; and the term "sea postage" shall mean the duty chargeable for the conveyance of letters by sea by vessels not packet boats; and the term "ship letter" shall mean a letter transmitted inwards or outwards over seas by a vessel not being a packet boat; and the term "treble letter" shall mean a letter consisting of more than two sheets or pieces of paper, whatever the number, under the weight of an ounce; and the term "treble postage" shall mean three times the amount of single postage; and the term "treble the duty of postage" shall mean three times the amount of the postage to which the letter to be charged would otherwise have been liable according to the rates of postage chargeable on letters; and the term "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland; and the term "valuable security" shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or

order for the delivery of transfer of any goods or valuable thing; and the term "vessel" shall include any ship or other vessel not a post-office packet; and whenever the term "between" is used in reference to the transmission of letters, newspapers, parliamentary proceedings, or other things between one place and another, it shall apply equally to the transmission from either place to the other; and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this act or the schedules thereto, with reference to any person or matter or thing, or to any persons, matters, or things, the singular or plural number or the masculine gender only is expressed, such expression shall be understood to include several persons, or matters, or things, as well as one person, or matter, or thing, and one person, matter, or thing, as well as several persons, or matters, or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

By sec. 48, "this act shall extend to and be in force in the Islands of Man, Jersey, Guernsey, Serk, and Alderney, and in all her Majesty's colonies and dominions where any post or post communication is established by or under the postmaster-general of the United Kingdom of Great Britain and Ireland."

Offences under the 3 & 4 Vict. c. 96—the act for the regulation of the duties of postage.] By the 3 & 4 Vict. c. 96 (U. K.), s. 22. "If any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any die, plate, or other instrument, or any part of any die, plate, or other instrument, which hath been, or shall or may be provided, made, or used, by or under the direction of the commissioners of stamps and taxes, or by or under the direction of any other person or persons legally authorised in that behalf, for the purpose of expressing or denoting any of the rates or duties, which are or shall be directed to be charged, under or by virtue of the authority contained in the recited act of the last sessions of parliament, or under or by virtue of this act; or if any person shall forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression, or any part of the stamp, mark, or impression of any such die, plate, or other instrument, which hath been, or shall or may be, so provided, made, or used, as aforesaid upon any paper, or other substance or material whatever; or if any person shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument, resembling, or intended to resemble, either wholly or in part, any die, plate, or other instrument, which hath been, or shall or may be, so provided, made, or used, as aforesaid; or if any person shall stamp or mark, or cause or procure to be stamped or marked, any paper, or other substance or material whatsoever, with any such false, forged, or counterfeit die, plate, or other instrument, or any part of such die, plate, or other instrument as aforesaid; or if any person shall use, utter, sell, or expose to sale, or shall cause or procure to be used, uttered, sold, or exposed to sale, or shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any paper, or other substance or material, having thereon the impression, or any part of the impression, of any such false, forged, or counterfeit die, plate, or other

instrument, or parts of any such die, plate, or other instrument, as aforesaid, or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression, of any such die, plate, or other instrument, which hath been, or shall or may be so provided, or made, or used, as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression, to be false, forged, or counterfeit; or if any person shall, with intent to defraud her Majesty, her heirs, or successors, privately or fraudulently use, or cause or procure to be privately or fraudulently used, any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used, as aforesaid, or shall with such intent privately or fraudulently stamp or mark, or cause or procure to be stamped or marked, any paper or other substance or material whatsoever, with any such die, plate, or other instrument, as last aforesaid; or if any person shall knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), have in his possession any paper or other substance or material, so privately or fraudulently stamped or marked, as aforesaid; then and in every such case, every person so offending, and every person knowingly and wilfully aiding, or abetting, or assisting, any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years, as the court shall award."

By s. 29, "If any person shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his custody or possession, not being legally authorised by the commissioners of excise, or other person appointed by the commissioners of her Majesty's treasury, and without lawful excuse, (the proof whereof shall lie on the person accused) any mould or frame, or other instrument, having therein any words, letters, figures, marks, lines, or devices, peculiar to and appearing in the substance of any paper, heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any machinery or parts of machinery, for working any threads into the substance of any paper or any such thread, and intended to imitate or pass for such words, letters, figures, marks, lines, threads, or devices; or if any person, except as before excepted, shall make, or cause or procure to be made, or aid or assist in the making of any paper in the substance of which shall be worked or shall appear visible, any words, letters, figures, marks, lines, threads, or devices, peculiar to, and worked into, or appearing visible in, the substance of any paper, heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same; or if any person, except as before excepted, shall knowingly have in his custody or possession, without lawful excuse, (the proof whereof shall lie on the person accused) any paper whatever, in the substance whereof shall be worked or appear visible any such words, letters, figures, marks, lines, threads, or devices, as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate or pass for the same; or if any person, except as aforesaid, shall by any art, mystery, or contrivance, cause or procure, or aid or assist in

causing or procuring, any such words, letters, figures, marks, lines, threads, or devices, as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same, to appear worked into or visible in the substance of any paper whatever, then and in every such case, every person so offending shall, for every such offence, be adjudged a felon, and shall be transported for the term of seven years, or shall be imprisoned, at the discretion of the court, before whom such persons shall be tried, for any period not less than two years."

By s. 30, "If any person not lawfully authorised, and without lawful excuse, (the proof whereof shall be on the person accused,) shall purchase or receive, or take or have in his custody or possession, any paper manufactured and provided, by or under the directions of the commissioners of excise, or other person or persons appointed to provide the same by the commissioners of her Majesty's treasury, for the purpose of being used for postage covers, envelopes, or stamps, and for receiving the impression of the dies, plates, or instruments, provided, made, or used, under the directions of the commissioners of stamps and taxes, or other person or persons, legally authorised in that behalf, before such paper shall have been duly stamped with such impression, and issued for public use, every such person shall for such offence, be guilty of a misdemeanor, and being convicted thereof shall, at the discretion of the court before whom such person shall be tried, be imprisoned for any period not more than three years, nor less than six calendar months."

PRISON BREACH.

WHERE a person is in custody on a charge of treason or felony and effects his escape by force, the offence is a felony at common law; where he is in custody on a minor charge it is a misdemeanor. 1 *Russ. by Grea.* 427; see statute 1 *Ed.* 2, *st.* 5, *infra.*

Upon a prosecution for prison breach, the prosecutor must prove, 1, the nature of the offence for which the prisoner was imprisoned; 2, the imprisonment and the nature of the prison; and 3, the breaking of the prison.

Proof of the nature of the offence for which the prisoner was imprisoned.] The statute *de frangentibus prisonam*, 1 Ed. 2, st. 2, enacts, "that none thenceforth that breaks prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken or imprisoned did require such a judgment, if he had been convicted thereupon according to the law and custom of the realm." If the offence therefore for which the party is arrested does not require judgment of life or member, it is not a felony. 1 *Russ. by Grea.* 428. And though the offence for which the party is committed is supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found of an inferior nature, it seems difficult to maintain that the breaking can be a felony. *Ibid.* It seems that the stating the offence in the *mittimus* to be one of lower degree than felony, will not prevent the breaking from being a felony, if in truth the original offence was such. *Hawk. P. C. b.* 2, *c.* 18, *s.* 15; 1 *Russ. by Grea.* 428. A prisoner on a charge of high treason, breaking prison, is only guilty of a felony. *Hawk. P. C. b.* 2, *c.* 18, *s.* 15. It is immaterial whether the party breaking prison has been tried or not. *Id. s.* 16.

Where the prisoner has been convicted the certificate of the clerk of assize, &c. with proof of identity, will be proof of the nature and fact of the conviction and of the species and period of confinement to which the party was sentenced. 4 *Geo.* 4, *c.* 64, *s.* 44.

Whenever a party is in lawful custody on a charge of felony, whether he has been taken upon a *capias*, or committed on a *mittimus*, he is within the statute, however innocent he may be, or however

groundless may be the prosecution against him; for he is bound to submit to his imprisonment, until he is discharged by due course of law. 2 *Inst.* 590; 1 *Hale*, 610: 2 *Hawk. c.* 18, *s.* 5. A party may therefore be convicted of the felony for breaking prison before he is convicted of the felony for which he was imprisoned; the proceeding in this instance differing from cases of escape and rescue. 2 *Inst.* 592; 1 *Hale*, 611; 2 *Hawk. c.* 18, *s.* 18. But although it is immaterial whether or not the prisoner has been convicted of the offence, which he has been charged with, yet if he has been tried and acquitted, and afterwards breaks prison, he will not be subject to the punishment of prison breach. And even if the indictment for the breaking of the prison be before the acquittal, and he is afterwards acquitted of the principal felony, he may plead that acquittal in bar of the indictment for felony for breach of prison. 1 *Hale, P. C.* 611, 612.

Proof of the imprisonment and the nature of the prison.] The imprisonment, in order to render the party guilty of prison breaking, must be a lawful imprisonment; actual imprisonment will not be sufficient; it must be *primâ facie* justifiable. Therefore where a felony has been committed, and the prisoner is apprehended for it, without cause of suspicion, and the *mittimus* is informal, and he breaks prison, this will not be felony, though it would be otherwise if there were such cause of suspicion as would form a justification for his arrest. *Hawk. P. C. b.* 2, *c.* 18, *s.* 7, 15; 1 *Hale, P. C.* 610. So if no felony has in fact been committed, and the party is not indicted, no *mittimus* will make him guilty within the statute, his imprisonment being unjustifiable. *Id.* But if he be taken upon a *capias* awarded on an indictment against him, it is immaterial whether he is guilty or innocent, and whether any crime has or has not in fact been committed, for the accusation being on record, makes his imprisonment lawful, though the prosecution be groundless. *Hawk. P. C. b.* 2, *c.* 18, *s.* 5, 6.

The statute extends to a prison in law, as well as to a prison in deed. 2 *Inst.* 589. An imprisonment in the stocks, or in the house of him who makes the arrest, or in the house of another, is sufficient. 1 *Hale, P. C.* 609. So if a party arrested, violently rescues himself from the hands of the party arresting him. *Ibid.* The imprisonment intended is nothing more than a restraint of liberty. *Hawk. P. C. b.* 2, *c.* 18, *s.* 4.

It is sufficient if the gaoler has a notification of the offence for which the prisoner is committed, and the prisoner of the offence for which he was arrested, and commonly, says Lord Hale, he knows his own guilt, if he is guilty, without much notification. 1 *Hale, P. C.* 610.

Proof of the breaking of the prison.] An actual breaking of the prison with force, and not merely a constructive breaking must be proved. If a gaoler sets open the prison doors, and the prisoner escapes, this is no felony in the latter. 1 *Hale, P. C.* 611. And if the prison be fired, and the prisoner escapes to save his life, this excuses the felony, unless the prisoner himself set fire to the prison. *Id.* In these cases the breaking amounts to a misdemeanor only. The breaking must be by the prisoner himself, or by his procurement, for if other persons without his privity or consent, break the prison, and he escape through the breach so made, he cannot be indicted for the breaking but only for the escape. 2 *Hawk. c.* 18,

s. 10. No breach of prison will amount to felony, unless the prisoner actually escape. 2 *Hawk. c.* 18, *s.* 12; 2 *Inst.* 590; 1 *Hale*, 611. A prisoner convicted of felony made his escape over the walls of the prison, in accomplishing which he threw down some bricks from the top of the wall, which had been placed there loose, without mortar, in the form of pigeon holes, for the purpose of preventing escapes. Being convicted of prison breaking, a doubt arose whether there was such force as to constitute that offence, but the judges were unanimously of opinion that the conviction was right. *Haswell's case, Russ. & Ry.* 458.

Punishment.] Although to break prison and escape, when lawfully committed for any treason or felony, still remains felony as at common law; the breaking prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor by fine and imprisonment. 4 *Bl. Com.* 130; 2 *Hawk. c.* 18, *s.* 21.

By the 7 & 8 Geo. 4, c. 28, s. 8, "every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes especially relating to such felony; and that every person convicted of any felony, for which no punishment hath been, or hereafter may be especially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment."

By s. 8, in cases of imprisonment, the court may award hard labour and solitary confinement; but the latter is not to exceed one month at a time, and three months in any one year.

By the Irish statutes, the 1 & 2 Wm. 4, c. 44, s. 4, every person who shall by force or violence break open any gaol, prison, or bridewell, with an intention to rescue and enlarge himself, or any other prisoner therein confined on account of any offence, though the same be not capital, shall be transported for life, or for seven or fourteen years; or be imprisoned, with or without hard labour, for any term not exceeding three years; and if a male, be once, twice, or thrice publicly or privately whipped, if the court shall think fit, in addition to such imprisonment; and shall and may be tried before the trial of the person or persons so enlarged.

Conveying tools, &c., to prisoners to assist in escape.] By the 4 Geo. 4, c. 64 (E.) s. 43, "if any person shall convey or cause to be conveyed into any prison to which that act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person, there for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years."

An indictment under this section need not set out the means which had been used by the defendant to assist the prisoner to escape. *Holloway's case*, 2 *Den. C. C. R.* 287. In that case the indictment charged that A., being a prisoner in a gaol, was meditating and endeavouring to effect his escape, and had procured a key to be made with intent to effect his escape, and had made overtures to the defendant, then and there being a turnkey in the said gaol, to induce the defendant to aid and assist him to escape; that the defendant then and there, and whilst A. was such prisoner in the gaol, received the said key with intent to enable A. to escape from the gaol and go at large whithersoever he would; and so the defendant then and there feloniously did aid and assist A., then and there being such prisoner, in so attempting to escape from the gaol. It was held that the offence was stated with sufficient particularity, and that the aiding and assisting sufficiently appeared to be an illegal act. It was held, also, that the prosecution need not, under this statute, be instituted within one year after the offence committed, as was required by 16 Geo. 2, c. 31, s. 4.

As to aiding escapes from prison, see also the 16 Geo. 2, c. 31.

Special enactments.] The offence of prison breach is made the subject of special provisions in various statutes. Thus, by the 8 Vict. sess. 2, c. 29, s. 24, prison breaking from the Pentonville prison, and by the 6 & 7 Vict. c. 26, s. 22, prison breaking from the Penitentiary at Milbank, are made punishable by additional imprisonment for three years, and, in case of a second offence, by transportation for seven years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male, with once, twice, or thrice whipping, public or private, at the discretion of the court. A similar punishment is enacted by the 1 & 2 Vict. c. 82, s. 12, for prison breach from Parkhurst prison.

RAILWAYS—OFFENCES RELATING TO.

Indictments against railway companies for nonfeasance, &c.] A railway company, although a corporation aggregate, may be indicted by their corporate name for disobedience to an order of justices requiring them to execute works pursuant to a statute. *R.* v. *Birmingham and Gloucester Railway Company*, 3 *Q. B.* 223; 9 *C. & P.* 469. It has likewise been held that a railway company might be indicted, for obstructing a highway, where they had built a wall across it, and had given another way to the public, which was not so convenient as the old way. *R.* v. *Scott*, 3 *Q. B.* 543. So a railway company may be indicted by their corporate name for a misfeasance, in cutting through a highway, where they have not strictly pursued the authority conferred by their act of parliament. *R.* v. *North of England Railway Company*, *Q. B.*, *T. T.*, 1846, MS. But a railway company is not indictable for a nuisance, if the works are made and used according to the terms of their parliamentary authority. *R.* v. *Pease*, 4 *B. & A.* 30.

False returns by railway companies to the board of trade] By the 3 & 4 Vict. c. 37 (U. K.), s. 4, "every officer of any company who shall wilfully make any false return to the lords of the said committee shall be deemed guilty of a misdemeanor."

Misconduct of servants of railway companies.] By the 3 & 4 Vict. c. 97, s. 13, "it shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine-driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the bye-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine-driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all

convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorised and required, upon complaint to him made, upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises,) in the discretion of such justice, be imprisoned with or without hard labour, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to her majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner." See the provisions of this section extended by the 5 & 6 Vict. c. 55, s. 17 (U. K.)

By the 3 & 4 Vict. c. 97, s. 14, (if upon the hearing of any such complaint he shall think fit) "it shall be lawful for any such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the quarter sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of her majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such court of quarter sessions as aforesaid (which said court is hereby required to take cognizance of and hear and determine such complaint,) shall be liable, in the discretion of such court, to be imprisoned, with or without hard labour, for any term not exceeding two years."

Obstructing railways.] By the 3 & 4 Vict. c. 97, s. 15, "every person who shall wilfully do or cause to be done any thing in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court before which he shall have been convicted, to be imprisoned, with or without hard labour, for any term not exceeding two years."

A party designedly placing on a railway substances having a tendency to produce an obstruction of the carriages, though he may not have done the act expressly with that object, was held to be indictable under this section. *Holroyd's case*, 2 *Moo. & R.* 339, *per Maule, J.*, and *Bowray's case*, 10 *Jur.* 211, *per Alderson, B.* And now the 14 & 15 Vict. c. 19, s. 6, enacts that "if any person shall wilfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall wilfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall wilfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall wilfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall wilfully and maliciously do or cause to be done any

other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, or to endanger the safety of any person travelling or being upon such railway, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

Sect. 7 enacts, "if any person shall wilfully and maliciously cast, throw, or cause to fall or strike against, into or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage, or truck, every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

Sect. 8 enacts, "if any person shall wilfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other act of parliament, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years."

RAPE.

Definition—statutes respecting.] RAPE is defined by Lord Hale to be the carnal knowledge of any woman, above the age of ten years, against her will; and of a woman child under the age of ten years, with or against her will. 1 *Hale, P. C.* 628; 3 *Inst.* 60; *Hawk. P. C. b.* 1, *c.* 41, *s.* 2. The offence has been the subject of various statutory provisions (Westm. 1, c. 13; Westm. 2, c. 35; 18 Eliz. c. 7, s. 1). The above statutes were repealed, and it was enacted by the 9 Geo. 4, c. 31, s. 16, that "every person convicted of the crime of rape shall suffer death as a felon." But now, by the 4 & 5 Vict. c. 56, s. 3, such person shall not be subject to any sentence, judgment, or punishment of death, but shall be liable to be transported beyond the seas for the term of his natural life. The corresponding Irish statute relative to the crime of rape, is the 10 Geo. 4, c. 34, s. 40, the punishment being similarly modified to transportation for life, by the 5 Vict. st. 2, c. 28, s. 15 (I.).

Proof with regard to the person committing the offence.] An infant under the age of fourteen years is presumed by law unable to commit a rape, but he may be a principal in the second degree, as aiding and assisting, if it appear by the circumstances of the case that he had a mischievous intent. 1 *Hale, P. C.* 630. *Elderhaw's case,* 3 *C. & P.* 396; *Groombridge's case,* 7 *C. & P.* 582. Where a lad under fourteen was charged with an assault to commit a rape, Patteson, J., said, "I think that the prisoner could not in point of law be guilty of the offence of assault with intent to commit a rape, if he was at the time of the offence under the age of fourteen. And I think also that if he was under that age, no evidence is admissible to show that in point of fact he could commit the offence of rape." *Phillips's case,* 8 *C. & P.* 736. See also *Jordan's case,* 9 *C. & P.* 118, where Williams, J., held that a boy under fourteen years of age could not be convicted of carnally knowing and abusing a girl under ten years old, although it was proved that he had arrived at puberty.

Although a husband cannot be guilty of a rape upon his own wife, he may be guilty as a principal in assisting another person to commit a rape upon her. *Lord Audley's case*, 1 *St. Tr.* 387, *fo. ed.* 1 *Hale, P. C.* 629. The wife in this case is a competent witness against her husband. *Id.*

Where a prisoner was convicted of a rape on an indictment, which charged that he "in and upon E. F., &c.," violently and feloniously did make (omitting the words "an assault"), and her the said E. F., then and there against her will violently and feloniously did ravish and carnally know against the form of the statute, &c.; it was held, by ten of the judges, that the omission of these words was no ground for arresting the judgment. *James Allen's case*, 9 *C. & P.* 521.

Proof with regard to the person upon whom the offence is committed.] It must appear that the offence was committed against the will of the woman; but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death or by duress. Nor is it any excuse, that she consented after the fact, or that she was a common strumpet; for she is still under the protection of the law, and may not be forced; or that she was first taken with her own consent, if she was afterwards forced against her will; or that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these circumstances, however, are material, to be left to the jury in favour of the accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence, 1 *East, P. C.* 444; 1 *Hale*, 628, 631; *Hawk. P. C. b.* 1, *c.* 41, *s.* 2.

The opinion, that, where the woman conceived, it could not be rape, because she must have consented, is now completely exploded. 1 *East, P. C.* 445; 1 *Russ. by Grea.* 677.

Whether carnal knowledge of a woman, who, at the time of the commission of the offence, supposed a man to be her husband, is a rape, came in question in the following case. The prisoner was indicted for a burglary, with intent to commit a rape. It appeared that the prisoner got into the woman's bed, as if he had been her husband, and was in the act of copulation, when she made the discovery; upon which, and before completion, he desisted. The jury found that he had entered the house with intent to pass for her husband, and to have connection with her, but not with the intention of forcing her, if she made the discovery. The prisoner being convicted, upon a case reserved, four of the judges thought that the having carnal knowledge of a woman, while she was under the belief of its being her husband's, would be a rape; but the other eight judges thought that it would not; several of the eight judges intimated that if the case should occur again, they would advise the jury to find a special verdict. *Jackson's case, Russ. & Ry.* 487. The point was again reserved, recently, in *Clarke's case*, 1 *Dears. C. C. R.* 397; *S. C.* 24 *L. J. M. C.* 25, where the Court of Criminal Appeal upheld the decision come to in *Jackson's case*, and decided that under the circumstances the prisoner was not guilty of rape. See also *Stanton's case*, 1 *C. & K.* 415.

Proof of the offence.] By the 9 Geo. 4, c. 31, s. 18 (the 10 Geo. 4, c. 34, I.), reciting that "upon trials for the crimes of buggery and of

rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes;" for remedy thereof, it is enacted, "that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only."

Upon two cases reserved, *Reekspear's case*, 1 *Moo. C. C.* 342, and *Cox's case*, *Id.* 337, 5 *C. & P.* 297; it was held by the judges, that proof of penetration is sufficient, notwithstanding emission be negatived: and in a more recent case, in which it was suggested by the counsel for the defence that *Cox's case* was not argued before the judges by counsel, and that doubts of the propriety of the decision were said to be entertained by the two judges not present; Patteson, J., said, "It is true that the case was not argued, but still I cannot act against their decision." The learned judge afterwards said, that if it should prove necessary the case should be further considered. The prisoner, however, was acquitted. *Brook's case*, 2 *Lew. C. C.* 267.

It has been made a question, upon trials for this offence, how far the circumstances of the hymen not being injured, is proof that there has been no penetration. In one case, where it was proved not to have been broken, Ashurst, J., left it to the jury to say whether penetration was proved; for that if there were any, however small, the rape was complete in law. The prisoner being convicted, the judges held the conviction right. They said that, in such cases, the least degree of penetration was sufficient, though it might not be attended with the deprivation of the marks of virginity. *Russen's case*, 1 *East, P. C.* 438. But in a late case, Gurney, B., said, "I think that if the hymen is not ruptured, there is not a sufficient penetration to constitute the offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases." *Gammon's case*, 5 *C. & P.* 321. So in *Beck's Medical Jurisprudence*, p. 53, it is said that it would be difficult to support an accusation of rape where the hymen is found entire.

In a late case, where the prisoner was indicted for carnally knowing a child under ten years of age, the surgeon stated that her private parts internally were very much inflamed, so much so that he was not able to ascertain whether the hymen had been ruptured or not. Bosanquet, J. (Coleridge and Coltman, JJ., being present), said, "It is not necessary in order to complete the offence, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." The prisoner was found guilty of an assault. *M'Rue's case*, 8 *C. & P.* 641.

In *Hughes's case*, 2 *Moo. C. C.* 190, it was held on a case reserved, that penetration, short of rupturing the hymen, is sufficient to constitute the crime of rape; and see *R.* v. *Lines*, *post*, p. 850.

On a trial for rape, it was proved that the prisoner made the prosecutrix quite drunk, and that when she was in a state of insensibility, the prisoner took advantage of it and violated her. The jury

convicted the prisoner, and found that the prisoner gave her liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her. A majority of the fifteen judges held that the prisoner was properly convicted of rape. *R.* v. *Camplin*, 1 *Den. C. C. R.* 89.

If the evidence be insufficient to support the charge of rape, but sufficient to establish the offence of attempting to commit a rape, the prisoner may be found guilty thereof. See 14 & 15 Vict. c. 100, s. 9, *ante*, p. 96.

Accessaries.] An indictment, charging the prisoner both as principal in the first degree, and as aiding and abetting other men in committing a rape, was held, after conviction, to be valid, upon the count charging the prisoner as principal. Upon such an indictment, it was held that evidence might be given of several rapes on the same woman, at the same time, by the prisoner and other men each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Folkes's case*, 1 *Moo. C. C.* 354. So a count charging A. with a rape, as a principal in the first degree, and B. as principal in the second degree, may be joined with another count charging B. as a principal in the first degree, and A. as principal in the second degree. *Gray's case*, 7 *C. & P.* 164.

Competency and credibility of the witnesses.] The party ravished, says Lord Hale, may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offence, and made pursuit after the offender, showed circumstances and signs of the injury (whereof many are of that nature that women only are the most proper examiners and inspectors); if the place in which the fact was done, was remote from people, inhabitants, or passengers; if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. 1 *Hale*, 633: 1 *East*, *P. C.* 448. On the other hand, if she concealed the injury for any considerable time, after she had an opportunity to complain; if the place, where the fact was supposed to have been committed, was near to inhabitants, or the common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, where it was probable she might have been heard by others; such circumstances carry a strong presumption that her testimony is false. *Ibid.* The fact that the prosecutrix made a complaint soon after the transaction is admissible, but the particulars of her complaint cannot be given in evidence; see *ante*, p. 23. She may be asked whether she named a person as having committed the offence, but not whose name she mentioned. *Per Cresswell, J.*, *R.* v. *Osborne*, *Carr. & M.* 622. But though the particulars of what she said cannot be asked in chief of the confirming witness, they may in cross-examination. *R.* v. *Walker*, 2 *Moo. & R.* 212.

A strict caution is given by Lord Hale, with regard to the evidence for the prosecution in cases of rape: "An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 *Hale*, 635.

General evidence of the prosecutrix's bad character is admissible,

ante, p. 93; but it has been held that evidence that she had connection with a particular person is inadmissible. *Hodgson's case, Russ. & Ry.* 211; *Clarke's case*, 2 *Stark. N. P.* 244, *ante*, p. 93, (but see *infra*); though the prosecutrix may be asked whether she has been formerly connected with the prisoner. *Ante*, p. 94. So Williams, J., held that the prosecutrix may be asked whether previous to the commission of the alleged rape, the prisoner has not had intercourse with her, with her own consent. *Martin's case*, 6 *C. & P.* 562. On a trial for rape, Park, J., (after consulting Mr. Justice James Parke) allowed the prisoner's counsel to ask the prosecutrix, with a view to contradict her, whether since the alleged offence she had not walked in the town of Oxford to look out for men, and whether she had not walked in High-street with a woman reputed to be a common prostitute. *Barker's case*, 3 *C. & P.* 589. On a trial for rape, the prosecutrix having on cross-examination denied that she had had connection with other men than the prisoner, those men may be called to contradict her. *Per Coleridge, J.*, after consulting *Erskine, J. Robins's case*, 2 *Moo. & R.* 512. In *Tissington's case*, 1 *Cox, C. C.* 48, Lord Abinger, on a trial for rape, allowed witnesses to be called to prove general want of decency in the prosecutrix, and then permitted the prosecutrix to call witnesses to rebut their evidence.

Where the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood; and it appeared that neither the mistress nor the washerwoman were under recognizance to give evidence, nor were their names on the back of the indictment, but they were at the assizes as witnesses for the prisoner, Pollock, C. B., directed that they should both be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in their examination. *Stroner's case*, 1 *C. & K.* 650.

Of the unlawful carnal knowledge of female children.] The unlawful carnal knowledge of female children, under the age of ten years, was declared to be felony, without benefit of clergy, by the 18 Eliz. c. 7; but that act being repealed by the 9 Geo. 4, c. 31, it is enacted by the latter statute, sect. 17, (and by the 10 Geo. 4, c. 34, I.) "that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, [and being convicted thereof, shall suffer death as a felon;] and if any person shall carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award."

The punishment for the felony is modified by transportation for life, by the 4 and 5 Vict. c. 56, s. 3 (E.), and the 5 Vict. st. 2, s. 2, c. 28, s. 15 (I.).

Upon an indictment for carnally knowing a girl under ten years of age, the proofs for the prosecution will be, 1. the commission of the offence; 2. that the child is under ten years of age.

The child herself, however tender her age, if incapable of distinguishing between right and wrong, may be examined in proof of the offence. *Brazier's case*, 1 *East, P. C.* 433, *ante*, p. 120; but her

declarations are inadmissible, *ante*, p. 121; though the fact of her having complained of the injury, recently after its having been received, is evidence in corroboration. *Brazier's case, supra;* see *ante*, p. 23. The propriety of corroborating the testimony of the infant, in a case of this kind, has been remarked upon by Mr. Justice Blackstone. 4 *Com.* 214, *ante*, p. 121. As to putting off the trial, for the purpose of having the infant witness instructed, *vide ante*, p. 121. In *Nicholas's case*, 2 *C. & K.* 246, Pollock, C. B., refused to grant an application to put off the trial on the ground that the prosecutrix, a child of six years of age, might be instructed as to the nature of an oath; and the witness by reason of her tender years being incompetent to be sworn, the same judge would not receive evidence of what the child stated to her mother shortly after the alleged offence took place, nor allow the mother to prove that the child mentioned to her the name of any particular person.

The age of the child must be proved. Where the offence was committed on the 5th of February, 1832, and the father proved that, on his return home on the 9th of February, 1822, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that she had been baptised on the 9th of February, 1822; this evidence was held insufficient to prove the age. *Wedge's case*, 5 *C. & P.* 298.

If on the trial of an indictment under this statute, the jury are satisfied, that at any time any part of the virile member of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence. *Per Parke, B.*, *Lines's case*, 1 *C. & K.* 393.

Assault with intent to ravish.] Upon an indictment for this offence the evidence will be the same as in rape, with the exception of the proof of the commission of the offence.

A boy under fourteen cannot be found guilty of an assault with intent to commit a rape. See *ante*, p. 845.

On an indictment for an assault with intent to commit a rape, Patteson, J., held that evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix, was not receivable to show the prisoner's intent.

In the same case, the learned judge held, that in order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Lloyd's case*, 6 *C. & P.* 318.

If upon an indictment for this offence the prosecutrix prove a rape actually committed, the defendant may nevertheless be convicted. See 14 & 15 Vict. c. 100, s. 12, *ante*, p. 96.

RECEIVING STOLEN GOODS.

Common law and former statutes.] BEFORE the 3 & 4 W. & M. c. 9, receivers of stolen goods, unless they likewise received and harboured the thief, were guilty only of a misdemeanor; but by that statute they were made accessaries after the fact, and consequently felons. By the 1 Anne, s. 2, c. 9, the receiver might be prosecuted for a misdemeanor, though the principal was not before convicted: and by the 5 Anne, c. 31, he might be so prosecuted, though the principal could not be taken. The offence was again changed to felony by 31 Geo. 3, c. 24, s. 3. These acts being now repealed, their provisions are consolidated in the 7 & 8 Geo. 4, c. 29 (E.) and the 9 Geo. 4, c. 55 (I.)

7 & 8 Geo. 4, c. 29—punishment.] By the 54th section (47th, I.) "if any person shall receive any chattel, money, or valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of that act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted, either as an accessary after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any period not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; provided always, that no person, howsoever

tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

By section 55, (s. 48, I.) "if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining or converting whereof is made an indictable misdemeanor by that act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

To bring a case of receiving within this section, the indictment must state the misdemeanor by which the goods were stolen, taken, obtained or converted. It is not enough to allege generally that the goods were unlawfully stolen, taken, obtained, or converted. *Wilson's case*, 2 *Moo. C. C.* 52.

By s. 60, (s. 53, I.) for the punishment of receivers, where the stealing, &c., is punishable on summary conviction, it is enacted, "that where the stealing or taking of any property whatsoever is punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall upon conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by that act made liable."

To support an indictment upon the 7 & 8 Geo. 4, c. 29, s. 54, the prosecutor must prove; 1. the stealing of the goods by the principal felon, if it be so stated in the indictment, or his conviction for that offence, if it be averred; 2. the receiving of the goods by the prisoner; 3. that the goods so received were those previously stolen; 4. the guilty knowledge of the prisoner.

Proof of the larceny by the principal.] It is not necessary to state in the indictment the name of the principal felon; and the usual practice in an indictment against a receiver for a substantive felony is, merely to state the goods to have been "before then feloniously stolen," &c., without stating by whom.

Where it was objected to a count charging the goods to have been stolen by "a certain evil-disposed person," that it ought either to have stated the name of the principal, or else that he was unknown, Tindal, C. J., said, the offence created by the act of parliament is not the receiving the stolen goods from any particular person, but receiving them, knowing them to have been stolen. The question, therefore, is, whether the goods were stolen, and whether the prisoner received them, knowing them to have been stolen. *Jervis's case*, 6 *C. & P.* 156; see also *Wheeler's case*, 7 *C. & P.* 170, *post*, p. 860. Where the goods had been stolen by some person unknown, it was formerly the practice to insert an averment to that effect in the indictment, and such averment was held good. *Thomas's case*, 2 *East*,

P. C. 781. But where the principal was known, the name was stated according to the truth. 2 *East, P. C.* 781. Where the goods were averred to have been stolen by persons unknown, a difficulty sometimes arose as to the proof, the averment being considered not to be proved, where it appeared that in fact the principals were known. Thus where, upon such an indictment, it was proposed to prove the case by the evidence of the principal himself, who had been a witness before the grand jury, Le Blanc, J., interposed, and directed an acquittal. He said he considered the indictment wrong in stating that the property had been stolen by a person unknown; and asked how the person who was the principal felon could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. *Walker's case*, 3 *Campb.* 264.

It is difficult to reconcile this decision with the resolution of the judges in the following case. The indictment stated that a certain person or persons, to the jurors unknown, stole the goods, and that the prisoner received the same, knowing them to have been feloniously stolen. The grand jury also found a bill, charging one Henry Moreton with stealing the same goods, and the prisoner with receiving them. It was objected that the allegation, that the goods were stolen by a person unknown, was negatived by the other record, and that the prisoner was entitled to an acquittal. The prisoner being convicted, the point was reserved, and the judges held the conviction right, being of opinion that the finding by the grand jury of the bill, imputing the principal felony to Moreton, was no objection to the second indictment, although it stated the principal felony to have been committed by certain persons to the jurors unknown. *Bush's case, Russ. & Ry.* 372.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. W. and E. F. feloniously received the said goods, knowing them to have been stolen, is bad as against A. B., the statement, that an evil-disposed person stole, being too uncertain to support the charge against the accessary before the fact; but the indictment was held to be good as against the receivers as for a substantive felony. *R.* v. *Caspar and others*, 2 *Moo. C. C.* 101; *S. C.* 9 *C. & P.* 289. It has been doubted whether, where the indictment alleges that the prisoner received the goods in question from a person named, it must be proved that the receipt was in fact from that person. See marginal note, *Messingham's case*, 1 *Moo. C. C.* 257. But where A. B. was indicted for stealing a gelding, and C. D. for receiving it, knowing it to have been "so feloniously stolen as aforesaid;" and A. B. was acquitted, the proof failing as to the horse having been stolen by him; Patteson, J., held that the other prisoner could not be convicted upon that indictment. *Woolford's case*, 1 *Moo. & R.* 384. But where a prisoner was indicted in one count for stealing goods, and in another for receiving the said goods, "so as aforesaid feloniously stolen," and the jury acquitted him of the stealing, but found him guilty of the receiving, and the counsel for the prisoner moved in arrest of judgment, upon the ground that the jury, having acquitted him of the stealing, could not, under the second count as it was recorded, find him guilty of receiving: upon a case reserved for the opinion of the Court of Criminal Appeal, they held the conviction to be good. *Craddock's case*, 2 *Den. C. C. R.* 31; *S. C.* 20 *L. J. M. C.* 31.

Where the indictment stated that the prisoner received the goods

from the person who stole them, and that the person who stole them was a person to the jurors unknown, and it appeared that the person who stole the property handed it to J. S., who delivered it to the prisoner; Parke, J., held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and would not allow it to go to the jury to say, whether the person from whom he was proved to have received it, was an innocent agent or not of the thief. *Elsworthy's case*, 1 *Lewin, C. C.* 117.

But where three persons were charged with a larceny, and two others as accessaries, in separately receiving portions of the stolen goods; and the indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods; the principals were acquitted, but the receivers were convicted on the last two counts of the indictment. *Pulham's case*, 9 *C. & P.* 280.

Where the indictment states a previous conviction of the principal, such conviction must be proved by the production of an examined copy of the record of the conviction, and it is no objection to such record, that it appears therein that the principal was asked if he was (not *is*) guilty; that it does not state that issue was joined, or how the jurors were returned, and that the only award against the principal is, that he be in mercy, &c. *Baldwin's case*, *Russ. & Ry.* 241; 3 *Campb.* 265; 2 *Leach*, 928 (*n*). But if the indictment state not the *conviction* but the *guilt* of the party, it seems doubtful how far the record of conviction would be evidence of that fact. *Turner's case*, 1 *Moo. C. C.* 347, *ante*, p. 53. The opinion of Mr. Justice Foster, however, is in favour of the affirmative. Where the accessary, he says, is brought to trial after the conviction of his principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor does the indictment aver that the principal was in fact guilty. It is sufficient if it recites with proper certainty the record of the conviction. This is evidence against the accessary, to put him on his defence; for it is founded on a legal presumption that every thing in the former proceeding was rightly and properly transacted. *Foster*, 365. Where the indictment stated that the principal felon had been convicted of the stealing, and in support of this averment, an examined copy of the record was put in, by which it appeared that the principal had pleaded guilty, it was objected that this was merely equivalent to a confession by the principal, and was not evidence against the receiver; but Bosanquet, J., ruled, that though the principal was convicted on his own confession, yet such a conviction was *primâ facie*, but not conclusive evidence against the accessary. *Blick's case*, 4 *C. & P.* 377. Where the principal felon has been convicted, it is sufficient in the indictment to state the *conviction* without stating the judgment. *Hyman's case*, 2 *Leach*, 925; 2 *East, P. C.* 782; *Baldwin's case*, 3 *Campb.* 265.

A lad having stolen a brass weight from his masters, it was taken from him by another servant in the presence of one of them, and was then returned to him, in order that he might take it for sale to the prisoner, to whom he had been in the habit of selling similar articles. The lad accordingly took it and sold it to the prisoner. It was contended that the brass could not be considered as stolen property, having been restored to the possession of one of the owners, and by him given to the lad to sell it to the prisoner with a view to his detection, and that such restoration, for however short a time, was suf-

ficient to prevent its being treated afterwards as stolen property, because it was in law in possession of the owners. Coleridge, J., said he should consider the evidence as sufficient in point of law to sustain the indictment, but would take a note of the objection. The jury found the prisoner guilty, and subsequently the learned judge, without reserving the point, passed sentence. *Lyons's case, Carr. & M.* 217. But this case must be considered as now overruled by *Dolan's case*, 1 *Dears. C. C. R.* 436; *S. C.* 24 *L. J. M. C.* 59. There the goods alleged to have been feloniously received, had been found by the owner in the pockets of the thief; but were subsequently, a policeman having been called in, returned to him, and he was sent by the owner to sell them where he had sold others. The thief thereupon went to the shop of the prisoner and sold the goods, and gave the money to the owner. It was held that the conviction was wrong; Campbell, C. J., in the course of his judgment, saying, "If an article once stolen has been restored to the master of that article, and he having had it fully in his possession bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of parliament?"

Proof of the receiving—distinction between receiving and stealing.] There must be proof of an actual taking into possession of the goods alleged to have been feloniously received. Thus where the persons who stole some fowls, sent them by coach in a hamper to Birmingham, with directions that they would be called for, and the prisoner when claiming the hamper as hers at the coach-office, was immediately taken into custody; the Court of Criminal Appeal held the conviction of the prisoner, as receiver, to be wrong, on the ground, that "whoever had possession of the fowls at the coach-office when the prisoner claimed to receive them, never parted with the possession; the prisoner by claiming to receive the fowls, which never were actually or potentially in her possession, never in fact in law received them." *Hill's case*, 1 *Den. C. C. R.* 453; *S. C.* 18 *L. J. M. C.* 199. *Wiley's case*, 2 *Den. C. C. R.* 37; *S. C.* 20 *L. J. M. C.* 4, was twice argued. The facts were these: A., B., and C. were jointly indicted for stealing and receiving five hens and two cocks. It was proved that about half-past four in the morning A. and B. were seen to go into C.'s father's house with a loaded sack, carried by A. C. lived with his father in the house, and was a higgler. A. and B. remained in the house about ten minutes, and were then seen to come out of the back-door preceded by C. with a candle, A. again carrying the sack on his shoulders, and to go into a stable belonging to the same house; the stable-door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing around it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag when opened was found to contain *inter alia* the stolen property. On C. being charged with receiving the poultry knowing it to be stolen, he said, "he did not think he would have bought the hens." Upon this evidence eight to four of the judges held that C. could not be convicted of receiving stolen goods, inasmuch as though there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive. But Patteson, J., one of the majority,

said, "I don't consider a manual possession or even a touch essential to a receiving; but it seems to me, there must be a control over the goods by the receiver, which there was not here." In accordance with this opinion in a case where the jury found that the stolen property (a watch) was in A.'s hands or pocket, but in the prisoner's absolute control, the court of criminal appeal held that he might be indicted as a receiver of stolen property, although he had never touched the property, or had manual possession of it. *Thomas Smith's case*, 1 *Dears. C. C. R.* 494; *S. C.* 24 *L. J. M. C.* 135. It frequently happens that a doubt arises whether the acts done by the person amount to a receiving, or to a stealing, as in the following cases; from which it appears that if the prisoner took part in the transaction, while the act of larceny by others was continuing, he will be guilty as a principal in the larceny, and not as a receiver. Dyer and Disting were indicted for stealing a quantity of barilla, the property of Hawker. The goods, consigned to Hawker, were on board ship at Plymouth. Hawker employed Dyer, who was the master of a large boat, to bring the barilla on shore, and Disting was employed as a labourer, in removing the barilla after it was landed in Hawker's warehouse. The jury found that while the barilla was in Dyer's boat, some of his servants, without his consent, removed part of the barilla, and concealed it in another part of the boat. They also found that Dyer afterwards assisted the other prisoner, and the persons on board who had separated this part from the rest in removing it from the boat for the purpose of carrying it off. Graham, B., (after consulting Buller, J.,) was of opinion, that though, for some purposes, as with respect to those concerned in the actual taking, the offence would be complete, as an asportation in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat where it was deposited, and who assisted in carrying it from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit, and Dyer having assisted in the act of carrying it off, was, therefore, guilty as principal. *Dyer's case*, 2 *East, P. C.* 767. Another case arose out of the same transaction. The rest of the barilla having been lodged in Hawker's warehouse, several persons employed by him as servants conspired to steal a portion of it, and accordingly removed part nearer to the door. Soon afterwards the persons who had so removed it, together with Atwell and O'Donnell, who had in the mean time agreed to purchase part, came and assisted the others (who took it out of the warehouse) in carrying it from thence. Being all indicted as principals in larceny, it was objected that two were only receivers, the larceny being complete before their participation in the transaction; but Graham, B., held, that it was a continuing transaction as to those who joined in the plot before the goods were actually carried away from the premises; and all the defendants having concurred in, or been present at, the act of removing the goods from the warehouse where they had been deposited, they were all principals; and the prisoners were convicted accordingly. *Atwell's case*, 2 *East, P. C.* 768.

In the following case the removal of the goods was held to be so complete, that a person concerned in the further removal was held not to be a party to the original larceny. Hill and Smith, in the absence of the prisoner, broke open the prosecutor's warehouse, and took thence the goods in question, putting them in the street about thirty yards from the warehouse door. They then fetched the pri-

soner, who was apprised of the robbery, and who assisted in carrying the property to a cart, which was in readiness. The learned judge who tried the case was of opinion that this was a continuing larceny, and that the prisoner who was present aiding and abetting in a continuation of the felony, was a principal in that portion of the felony, and liable to be found guilty; but on a case reserved, the judges were of opinion, that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as the principal, and the conviction, as such, was held wrong. *King's case, Russ. & Ry.* 332. The same conclusion was come to in the following case. One Heaton having received the articles in question into his cart, left it standing in the street. In the mean time the prisoner M'Makin came up and led away the cart. He then gave it to another man to take it to his (M'Makin's) house, about a quarter of a mile distant. Upon the cart arriving at the house, the prisoner Smith, who was at work in the cellar, having directed a companion to blow out the light, came up and assisted in removing the articles from the cart. For Smith it was argued, that the *asportavit* was complete before he interfered, and *Dyer's case, ante*, p. 856, was cited, and Lawrence, J., after conferring with Le Blanc, J., was of this opinion, and directed an acquittal. *M'Makin's case, Russ. & Ry.* 333 (*n*). Upon the authority of *King's case*, the following decision proceeded. The prisoner was indicted for stealing two horses. It appeared that he and one Whinroe went to steal the horses. Whinroe left the prisoner when they got within half a mile of the place where the horses were, stole the horses, and brought them to the place where the prisoner was waiting for him, and he and the prisoner rode away with them. Mr. Justice Bayley at first thought that the prisoner's joining in riding away with the horses might be considered a new larceny; but on adverting to *King's case* (*supra*), he thought this opinion wrong, and on a case reserved, the judges were of opinion that the prisoner was an accessary only, and not a principal, because he was not present at the original taking. *Kelly's case, Russ. & Ry.* 421.

The circumstances in the next case were held not to constitute a receiving. The prisoner was indicted for receiving goods stolen in a dwelling-house by one Debenham. Debenham, who lodged in the house, broke open a box there and stole the property. The prisoner was seen walking backwards and forwards before the house, and occasionally looking up; and he and Debenham were seen together at some distance, when he was apprehended, and part of the property found on him. The jury found that Debenham threw the things out of the window, and that the prisoner was in waiting to receive them. Mr. Justice Gaselee thought, that under this finding it was doubtful, whether the prisoner was guilty of receiving, and reserved the point for the opinion of the judges, who held that the prisoner was a principal, and that the conviction of him as receiver was wrong. *Owen's case*, 1 *Moody, C. C.* 96. And in *Perkins's case*, 2 *Den. C. C. R.* 459, the court of criminal appeal held that a principal in the second degree, *particeps criminis*, could not at the same time be treated as a receiver. Maule, J., said: "The judge seems to have intended to have asked us whether in a case where a prisoner was, in a popular sense, guilty of receiving, he might be treated as a receiver, notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot."

Where the evidence leaves it doubtful in what manner the goods first came to the prisoner's possession, there should be two counts,

and D. with receiving other part of the stolen property; another count charged C. and D. with the substantive felony of jointly receiving the whole of the stolen property, and there were two other counts charging C. and D. separately with the substantive felony of each receiving part of the stolen property. It was proved that A. and B. had committed the burglary, and stolen the property, but the evidence as to the receiving showed that C. and D. had received the stolen property on different occasions, and quite unconnectedly with each other. It was objected that the count charging a joint receiving was not proved (see *Messingham's case, supra*), and that as distinct felonies had been committed by C. and D., they ought to have been tried separately. Per Littledale, J., "There is certainly some inconsistency in this indictment; but the practice in cases of receivers is to plead in this manner." The prisoners were all convicted. *Hartall's case*, 7 *C. & P.* 475.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. *Hayes's case*, 2 *Moo. & Rob.* 156.

An indictment in the first count charged W. and R. C. with killing a sheep, "with intent to steal one of the hind legs of the said sheep;" and in another count charged J. C. with receiving nine pounds' weight of mutton "of a certain evil-disposed person," he then knowing that the mutton had been stolen. Coleridge, J., said, "This count is for receiving stolen goods, and it is joined not with another count against other persons for stealing anything, but with a count for killing with intent to steal, which appears to me an offence quite distinct in its nature from that imputed to the prisoner (J. C.). I shall not stop the case, but I will take care that the prisoner has any advantage that can arise from the objection, if, upon consideration, I should think it well founded." The prisoners were all convicted. *Wheeler's case*, 7 *C. & P.* 170.

Proof of the particular goods received.] The proof of the goods received must correspond with the allegation in the indictment, and substantially with the allegation of the goods stolen by the principal felon. But it is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination, as where the principal was charged with stealing a live sheep, and the accessary with receiving twenty pounds of mutton, *part of the goods* stolen. *Cowell's case*, 2 *East, P. C.* 617. But where the principal felon was charged with stealing six promissory notes of 100*l.* each, and the other prisoner with receiving "the said promissory notes," knowing them to have been stolen, and it appeared that he had only received the proceeds of some of the notes, it was ruled, that the prisoner charged with the receiving must be acquitted. *Walkley's case*, 4 *C. & P.* 132.

Upon an indictment for receiving a lamb, it appeared in evidence that at the time of the receiving, the lamb was *dead*, but on a case reserved, the judges held that it was immaterial as to the prisoner's offence, whether the lamb was alive or dead, the offence and the punishment for it being in both cases the same. *Puckering's case*, 1 *Moody, C. C.* 242.

Proof of guilty knowledge.] Evidence must be given of the prisoner's guilty knowledge, that he received the goods in question,

knowing them to have been stolen. In general this evidence is to be collected from all the various circumstances of the case. The usual evidence is, that the goods were bought at an undervalue by the receiver. Proof that he concealed the goods is presumptive evidence to the same effect. So evidence may be given that the prisoner pledged or otherwise disposed of other articles of stolen property besides those in the indictment, in order to show the guilty knowledge. *Dunn's case*, 1 *Moo. C. C.* 150.

In *Oddy's case*, 2 *Den. C. C. R.* 265, *S. C.* 20 *L. J. M. C.* 198, in order to prove the *scienter*, evidence was given that on a previous occasion other stolen goods, the property of different owners, had been found in the possession of the prisoner. It was held however by the Court of Criminal Appeal that such evidence had been improperly admitted.

The following enumeration of the circumstances from which a presumption of the prisoner's guilty knowledge may be gathered, well illustrates the subject. "Owing to the jealousy and caution so necessary in this sort of traffic, it often happens that no express disclosure is made, and yet the illegal acquisition of the articles in question is as well understood, as if the receiver had actually witnessed the depredation. In this, as in other cases, therefore, it is sufficient if circumstances are proved, which to persons of ordinary understanding, and situated as the prisoner was, must have led to the conclusion that they were illegally acquired. Thus, if it be proved that the prisoner received watches, jewellery, large quantities of money, bundles of clothes of various kinds, or moveables of any sort, to a considerable value, from boys or other persons destitute of property, and without any lawful means of acquiring them; and especially if it be proved that they were brought at untimely hours, and under circumstances of evident concealment, it is impossible to arrive at any other conclusion, but that they were received in the full understanding of the guilty mode of their acquisition. This will be still further confirmed, if it appear that they were purchased at considerably less than their real value, concealed in places not usually employed for keeping such articles, as under beds, in coal-cellars, or up chimneys; if their marks be effaced, or false or inconsistent stories told as to the mode of their acquisition. And it is a still further ingredient towards inferring guilty knowledge, if they have been received from a notorious thief, or one from whom stolen goods have, on previous occasions, been received." *Alison's Princ. Crim. Law of Scotl.* 330.

Where it was averred that the prisoner, "*Francis* Morris the goods and chattels, &c., feloniously did receive and have; he the said *Thomas* Morris then and there well knowing the said goods and chattels to have been feloniously stolen," &c., it was moved in arrest of judgment, that the indictment was bad, for that the fact of receiving, and the knowledge of the previous felony, must reside in the same person, whereas this indictment charged them in two different persons; but the judges held that the indictment would be good without the words "the said Thomas Morris," which might be struck out as surplusage. *Morris's case*, 1 *Leach*, 109. But where an indictment alleged that the prisoner received the goods of A. B. "he, the said A. B., then knowing them to have been stolen," it was held to be good ground of motion in arrest of judgment that the *scienter* was omitted. *Larkin's case*, 1 *Dears. C. C. R.* 365; *S. C.* 23 *L. J. M. C.* 125.

The *intention* of the party in receiving the goods is not material, provided he knew them to be stolen. Where it was objected that there was no evidence of a conversion by the receiver, Gurney, B., said, if the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same. *Davis's case*, 6 *C. & P.* 178. If a receiver of stolen goods receive them for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased them. *Per Taunton, J., Richardson's case, C. & P.* 335.

The rule by the law of Scotland is the same. If the prisoner once receive the goods into his keeping, it is immaterial upon what footing this is done, whether by purchase, pledge, barter, or as a mere depository for the thief. Nay, though he buy them for full value, the crime is the same, because he knowingly detains them from the true owner; but the fact of a fair price having been paid is an important circumstance to outweigh the presumption of the guilty knowledge. *Alison's Princ. Crim. Law of Scotl.* 329; *Hume*, 113; *Burnett*, 155, 156.

Proof where the prisoner is charged as principal and receiver in different counts.] A person may be legally charged in different counts of the same indictment, both as the principal felon and as the receiver of the same goods. *Galloway's case*, 1 *Moo. C. C.* 234. But the judges, on a case reserved, were equally divided in opinion whether the prosecutor should in such case be put to his election. They all agreed, however, that directions should be given to the respective clerks of assize not to put both charges in the same indictment. *Id.* Now, however, it is enacted by 11 & 12 Vict. c. 46, that "in every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the same property, knowing it to have been stolen; and in any indictment for feloniously receiving property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same property; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property or of receiving it knowing it to have been stolen. And if such indictment shall have been preferred and found against two or more persons it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty, either of stealing the property or of receiving it knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it, knowing it to have been stolen." There may be as many counts charging a felonious receiving as there are counts charging stealing, and the prosecutor cannot be put to his election on what count or counts he will proceed. *Beeton's case*, 1 *Den. C. C. R.* 414; *S. C.* 18 *L. J. M. C.* 117.

A count for receiving stolen goods in a different county from that in which the trial takes place, coupled with other counts for the larceny, must, of distinct and express averments, show upon the face of it jurisdiction within the 7 & 8 Geo. 4, c. 29, s. 56. Thus, where J. M. and two others were charged in several counts of an indictment with sheep-stealing, and counts were also added for receiving, and at the trial which took place at the sessions for the county of *Dorset*,

J. M. was convicted upon a count which charged him with feloniously receiving at the parish of T. "in the county of *Somerset*, one wether sheep, &c.," being the same property as is mentioned in the fifth count of the indictment of the "cattle, goods, &c.," his conviction was held bad in arrest of judgment, as not showing on the face of it jurisdiction to try the offence under 7 & 8 Geo. 4, c. 29, s. 56. Although the fifth count on which the other two prisoners were convicted charged them with the sheep-stealing at the parish of S. in the county of *Dorset*. *Martin's case*, 1 *Den. C. C. R.* 398; *S. C.* 18 *L. J. M. C.* 137.

Proof by the prisoner of innocence of principal felon.] The party charged as receiver may controvert the guilt of the principal felon, even after his conviction, and though that conviction is stated in the indictment. For, as against him, the conviction is only presumptive evidence of the principal's guilt, under the rule that it is to be presumed that in the former proceeding every thing was rightly and properly transacted. It being *res inter alios acta*, it cannot be conclusive as to him. *Foster*, 365. If, therefore, it should appear, on the trial of the receiver, that the offence of which the principal was convicted did not amount to felony (if so charged), or to that species of felony with which he is charged, the receiver ought to be acquitted. *Id.* Thus where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared on the cross-examination of the prosecutor, that, in fact, the party convicted had only been guilty of a breach of trust, the prisoner, on the authority of Foster, was acquitted. *Smith's case*, 1 *Leach*, 288; *Prosser's case*, *Id.* 290 (*n*).

Witnesses—competency of principal felon.] The principal felon is a competent witness for the crown to prove the whole case against the receiver. *Haslam's case*, 1 *Leach*, 418; *Price's case*, *Patram's case*, *Id.* 419, (*n*); 2 *East*, *P. C.* 732. But the *confession* of the principal felon is not evidence against the receiver. *Turner's case*, 1 *Moo. C. C.* 347.

Venue.] By the 7 & 8 Geo. 4, c. 29, s. 76, (after providing that nothing contained in the act shall extend to Scotland or Ireland, except as follows,) it is enacted, "that if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen, or otherwise feloniously taken in any other part of the united kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence, in that part of the united kingdom, where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part."

And by sec. 56, (s. 49 of the 9 Geo. 4, c. 55, I.) "if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessary after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in any county or place in which he shall have, or shall have had, any such property in his possession; or in

any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished, in the county or place where he actually received such property."

Upon an indictment against a principal and receiver, in respect of goods stolen in one county and received in another, although the case is tried in the county in which the property was stolen, it is not necessary to allege in the indictment that the receipt took place in the other county, and the want of such averment is neither available in arrest of judgment, nor on the ground of variance. *Per Maule, J. R.* v. *Hinley,* 1 *Cox, C. C.* 12. See *Martin's case, supra.*

As to the offence of receiving anchors, cables, &c., see *ante,* p. 668; and as to receiving property sent by the post, and stolen therefrom, *ante,* p. 830.

RESCUE.

Nature of the offence.] THE offence of rescue nearly resembles that of prison breach, which has already been treated of, *ante*, p. 838.

Where the party rescued is imprisoned on a charge of felony, the rescuing is felony also. 1 *Hale, P. C.* 606. Where the offence of the former is a misdemeanor, that of the latter will be a misdemeanor also. *Hawk. P. C. b.* 2, *c.* 21, *s.* 6.

If the party rescued was imprisoned for felony, and was rescued before indictment, the indictment for the rescue must surmise a felony done, as well as an imprisonment for felony, or on suspicion of felony, but if the party was indicted and taken upon a *capias*, and then rescued, there needs only a recital that he was indicted *prout*, &c., and taken and rescued. 1 *Hale, P. C.* 607.

Though the party rescuing may be *indicted* before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal is attainted. *Id.* In such case, however, he may, as it seems, be indicted and tried for a misdemeanor, though not for a felony. 1 *Hale, P. C.* 399.

Proof of the custody of the party rescued.] To make the offence of rescuing a party felony, it must appear that he was in custody for felony or suspicion of felony, but it is immaterial whether he was in the custody of a private person, or of an officer, or under a warrant of a justice of the peace, for where the arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that the party rescuing should have knowledge that the other is under arrest for felony, if he be in the custody of a private person, though if he be in the custody of a constable or sheriff, or in prison, he is bound to take notice of it. 1 *Hale, P. C.* 606. If the imprisonment be so far irregular that the party imprisoned would not be guilty of prison-breach by making his escape, a person rescuing him will not subject himself to the punishment of rescue. *Hawk. P. C. b.* 2, *c.* 21, *s.* 1, 2; 1 *Russ. by Grea.* 435.

A warrant of a justice to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good; and therefore if upon such warrant the party be arrested, and afterwards rescued, those

who are guilty of the rescue may be convicted of a misdemeanor. *Stoke's case*, 5 *C. & P.* 146.

Proof of the rescue.] The word *rescue*, or some word equivalent thereto, must appear in the indictment, and the allegation must be proved by showing that the act was done forcibly, and against the will of the officer who had the party rescued in custody. *Burridge's case*, 3 *P. Wms.* 483. In order to render the offence of rescue complete, the prisoner must actually get out of the prison. *Hawk. P. C. b.* 2, *c.* 18, *s.* 12.

Punishment.] The offence of rescuing a person in custody for felony was formerly punishable as a felony within clergy at common law. *Stanley's case*, *Russ. & Ry.* 432. But now by the 1 & 2 Geo. 4, c. 88, (E. & I.) s. 1, "if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years."

Aiding a prisoner to escape.] Under the head of rescue may be classed the analogous offence of aiding a prisoner to escape. This, as an obstruction of the course of justice, was an offence at common law, being a felony where the prisoner was in custody on a charge of felony, and a misdemeanor in other cases, whether the charge were criminal or not. See *Burridge's case*, 3 *P. Wms.* 439; *R.* v. *Allan*, *Carr. & M.* 295.

Aiding a prisoner to escape — offence under various statutes.] The offence of assisting a prisoner to escape has, by various statutes, been subjected to different degrees of punishment.

By the 25 Geo. 2, c. 27, s. 9, if any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue, or set at liberty, any person out of prison who shall be committed for, or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, [and shall suffer death without benefit of clergy.]

Now by the 7 Wm. 4, and 1 Vict. c. 91, the punishment of death is abolished, and parties guilty of the offences mentioned in the above section, are liable to be transported for life, or for not less than fifteen years, or to be imprisoned for any term not exceeding three years.

By 4 Geo. 4, c. 64, s. 43, (E.) the conveying any disguise or instruments into any prison with intent to aid or assist a prisoner to escape is made a felony, punishable by transportation for fourteen years, and the assisting any prisoner in attempting to make his escape from

any prison, is subject to the same punishment. Similar provisions are contained in the 16 Geo. 2, c. 31, (E.) with respect to the king's bench and fleet prisons, and the other prisons not comprised in the 4 Geo. 4, c. 64.

Upon the 16 Geo. 2, c. 31, it has been held, that the act is confined to cases of prisoners committed for felony, expressed in the warrant of commitment or detainer, and therefore a commitment on suspicion only is not within the act. *Walker's case*, 1 *Leach*, 97; *Greeniff's case*, 1 *Leach*, 363. It was likewise held on the construction of this statute, that it does not extend to a case where the escape has been actually effected, but only to the attempt. *Tilley's case*, 2 *Leach*, 662. The delivering the instrument is an offence within the act, though the prisoner has been pardoned of the offence of which he was convicted, on condition of transportation; and a party may be convicted, though there is no evidence that he knew of the specific offence of which the prisoner he assisted had been convicted. *Shaw's case*, *Russ. & Ry.* 526.

Where the record of the conviction of the person aided is set forth, and is produced by the proper officer, no evidence is admissible to contradict that record. *Shaw's case*, *Russ. & Ry.* 526.

By the 52 Geo. 3, c. 156, (U. K.) aiding and assisting prisoners of war to escape is felony, punishable with transportation for life, or fourteen, or seven years. See *Martin's case*, *R. & R.* 196.

As to aiding and assisting persons convicted by a military or naval court-martial to escape, see the 6 Geo. 4, c. 5, s. 13; 6 Geo. 4, c. 6, s. 14.

As to rescuing returned transports, see *post*, title *Transportation, returning from.*

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

Proof of riot—nature of in general.] A RIOT is defined by Hawkins to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. *Hawk. P. C. b.* 1, *c.* 65, *s.* 1. See *Langford's case*, p. 873.

The indictment for a riot must conclude in *terrorem populi. Hughes's case*, 4 *C. & P.* 373.

The punishment for a riot is fine or imprisonment, or both, and by the 3 Geo. 4, c. 114, the imprisonment may be with hard labour.

Proof of the unlawful assembling.] An unlawful assembling must be proved, and, therefore, if a number of persons, met together at a fair, suddenly quarrel, it is an affray, and not a riot, *ante*, p. 262; but if, being so assembled, on a dispute occurring, they form into parties, with promises of mutual assistance, and then make an affray, it will be a riot; and, in this manner, any lawful assembly may be converted into a riot: so a person, joining rioters, is equally guilty, as if he had joined them while assembling. *Hawk. P. C. b.* 1, *c.* 65, *s.* 3.

Proof of the violence or terror.] Evidence must be given of some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto, as are calculated to strike terror into the public; as a show of arms, threatening speeches, or turbulent gestures. *Hawk. P. C. b.* 1, *c.* 65, *s.* 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, with the

predetermined purpose of preventing the performance, it will be a riot, though no personal violence is done to any individual, and no injury done to the house. *Clifford* v. *Brandon*, 2 *Campb.* 358. But the unlawfulness of the object of an assembly, even though they actually carry their unlawful object into execution, does not constitute a riot, unless accompanied by circumstances of force or violence; and in the same manner, three or more persons assembling together peaceably, to do an unlawful act, is not a riot. *Hawk. P. C. b.* 1, *c.* 65, *s.* 5.

In some cases in which the law authorises force, the use of such force will not constitute a riot, as where a sheriff or constable, or perhaps even a private person assembles a competent number of persons, in order with force to suppress rebels, or enemies, or rioters. *Hawk. P. C. b.* 1, *c.* 65, *s.* 2. So a private individual may assemble a number of others to suppress a common nuisance, or a nuisance to his own land. Thus where a weir had been erected across a common navigable river, and a number of persons assembled, with spades and other necessary instruments, for removing it, and did remove it, it was held to be neither a forcible entry nor a riot. *Dalt. c.* 137. So an assembly of a man's friends at his own house, for the defence of his person, or the possession of his house, against such as threaten to beat him, or to make an unlawful entry, is excusable. 5 *Burn*, 278.

Proof of the object of the rioters—private grievance.] It must appear that the injury or grievance complained of, relates to some private quarrel only, as the inclosing of lands in which the inhabitants of a certain town claim a right of common, for where the intention of the assembly is to redress public grievances, as to pull down all inclosures in general, an attempt with force to execute such intention will amount to high treason. *Hawk. P. C. b.* 1, *c.* 65, *s.* 6. Where the object of an insurrection, says Mr. East, is a matter of a private or local nature, affecting, or supposed to affect, only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures, (see *Birt's case*, 5 *C. & P.* 154,) to remove a local nuisance, to release a particular prisoner, (unless imprisoned for high treason,) or even to oppose the execution of an act of parliament, if it only affect the district of the insurgents, as in the case of a turnpike act. 1 *East, P. C.* 75. As to prize fights, see *ante*, p. 262.

Proof of the execution of the act for which the rioters are assembled.] The act for the purpose of executing which the rioters are assembled must be proved, otherwise the defendants must be acquitted. Where persons assemble together for the purpose of doing an act, and the assembly is such as hereinbefore described, if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble but proceed to execute their design, and actually execute it, it is then a riot. 1 *Hawk. c.* 65, *s.* 1; *Dalt. c.* 136; *Birt's case*, 5 *C. & P.* 154.

Proof of the guilt of the defendants.] In proving the participation of the defendants in the riot, it is not, as it seems, competent to the pro-

secutor to prove a riot in the first instance, and afterwards to connect the prisoners with such riot. Where the counsel for the prosecution was pursuing this course, Alderson, J., interposed, and said that he must identify the prisoners as having been present. He stated that it had been held by the judges at the special commission at Salisbury, in 1830, that the prisoners must first be identified as having been present, forming part of the crowd, and that the fifteen judges had confirmed the holding of the special commission. *Nicholson's case*, 1 *Lewin, C. C.* 300.

In the above case, it was stated by the counsel for the prosecution, that an opposite course had been pursued in the *Manchester case*. And the latter mode of proof is adopted in cases of conspiracy. See *ante*, p. 399.

On the trial of an action of trespass, the issues were, whether a conspiracy had existed to excite discontent and dissatisfaction, and also whether there had been an unlawful assembly to the terror of the inhabitants of the town of Manchester. For the purpose of proving the affirmative, evidence was offered of large bodies of men having been seen, on the morning of the day in question, marching along the road, and of expressions made use of by them tending to show that they were proceeding to a place called Whitemoss, for the purpose of being drilled. Evidence was also offered of drillings in the neighbourhood of Manchester, previous to the meeting, and a witness was asked whether the proceedings which he saw created any alarm in his mind. Another witness stated that he saw several parties of men proceeding to the place where there had been drillings, and he was asked as to their having solicited him to join them, and as to declarations made by some of those persons with regard to the object and purpose of their going thither. The whole of this evidence was objected to, but was admitted by Holroyd, J., and on a motion for a new trial, the court of king's bench held that it had been rightly received. *Redford* v. *Birley*, 3 *Stark. N. P.* 76.

Proof of refusing to aid constable in quelling a riot.] To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove, 1st, that the constable saw a breach of the peace committed; 2nd, that there was a reasonable necessity for calling on the defendant for his assistance; and, 3rd, that when duly called upon to assist the constable, the defendant without any physical infirmity or lawful excuse, refused to do so. *Brown's case*, *Car. & M.* 314; *per Alderson, B.* It is not a valid ground of defence to such an indictment that from the number of rioters the single aid of the defendant would not have been of any use. *Id.*

A person charged to aid a constable, and who does so is protected *eundo, morando, et redeundo*. *Phelps's case*, *Car. & M.* 180; *per Coltman, J.*

Proof upon prosecutions under the riot act.] By the 1 Geo. 1, stat. 2, c. 5, s. 1, (commonly called the riot act,) it is enacted, "that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by one or more justice or justices of the peace, or by the sheriff of the county, or by his under-sheriff, or by the mayor, bailiff, or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly

shall be, by proclamation, to be made in the king's name in the form thereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, and shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such remaining or continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, [and shall suffer death, as in the case of felony, without benefit of clergy.]"

By sec. 5, opposing and hindering the making of the proclamation shall be adjudged felony, without benefit of clergy, and persons assembled to the number of twelve, to whom proclamation should have been made, if the same had not been hindered, not dispersing within an hour after such hinderance, having knowledge thereof, shall be adjudged felons [and suffer death].

Now by the 7 Wm. 4 and 1 Vict. c. 91, s. 1, after reciting (*inter alia*) the above statute, it is enacted, "That if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By sec. 2, in cases of imprisonment the court may award hard labour, and also solitary confinement not exceeding one month at any one time, and three months in any one year.

The second section of the riot act gives the form of the proclamation, concluding with the words "God save the King." Where, in the reading of the proclamation, these words were omitted, it was held that the persons continuing together did not incur the penalties of the statute. *Child's case*, 4 *C. & P.* 442.

The Irish statute, corresponding to the English riot act, is the 27 Geo. 3, c. 15, c. 28, ss. 1, 3, the punishment being modified as in the 7 Wm. 4, & 1 Vict., by the 5 Vict. st. 2, c. 28, s. 6 (I.).

Upon an indictment under the first section of the 1 Geo. 1, st. 2, c. 5, the prosecutor must prove, 1, That the prisoners, with others, to the number of twelve, were unlawfully, riotously, and tumultuously assembled together; 2, That proclamation was made in the form given by the second section of the statute; 3, That the defendants, with others, to the number of twelve, remained, or continued unlawfully, riotously, and tumultuously together, for one hour or more after the proclamation; lastly, it must be proved that the prosecution has been commenced within twelve months after the offence committed. 1 Geo. 1, st. 2, c. 5, s. 8.

Upon an indictment under the riot act, it was not proved that the prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour; it was held by Patteson, J., that it was a question for the jury upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for, although he might have occasion to separate himself for a minute or two, yet, if in substance he was there during the hour, he would not be thereby excused. *R.* v. *James*, 1 *Russ. by Grea.* 277.

The second or subsequent reading of the act does not do away with the effect of the first reading, and the hour is to be computed from the time of the first reading. *Per Patteson, J., Woolcock's case*, 5 *C. & P.* 517.

If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, the case is within the act, and whether there was a cessation or not, is a question for the jury. *Ibid.*

An indictment under the riot act for remaining assembled one hour after proclamation made, need not charge the original riot to have been in *terrorem populi*; it is sufficient if it pursue the words of the act. *Per Patteson, J., James's case*, 5 *C. & P.* 153.

Proof of demolishing buildings, &c.] The offence of demolishing buildings by rioters (formerly provided against by the statutes 1 Geo. 1, st. 2, c. 5, 9 Geo. 3, c. 29, 52 Geo. 3, c. 130, and 56 Geo. 3, c. 125, repealed), is now forbidden by the 7 & 8 Geo. 4, c. 30, s. 8, which enacts, "that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

In order to prove that there was a beginning to demolish the house, it must be proved that some part of the freehold was destroyed; it is not therefore sufficient to prove that the windows sometimes were demolished. *Per Littledale, J., R.* v. *Howell*, 9 *C. & P.* 437.

The 6 Vict. c. 10, after reciting the above section, and the 4 & 5 Vict. c. 56, which had commuted therein the punishment of death, enacts, that "if any person shall be convicted of the offences hereinbefore in the said act first above recited, specified, such person shall be liable at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned with or without hard labour, for any time not exceeding three years."

The 4 & 5 Vict. c. 56, s. 3, empowers the court to add beside hard labour, solitary confinement to the imprisonment, such solitary confinement not exceeding one month at any one time, nor three months in any one year.

As to this and similar offences in Ireland, see the 27 Geo. 3, c. 15, ss. 5, 8, 9, 10, the punishment being modified by the 5 Vict. st. 2, c. 28, s. 7 (I.).

The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common law definition of a riot must be resorted to, and in such case, if any

one of her majesty's subjects be terrified, this is a sufficient terror and alarm, to substantiate that part of the charge of riot. *Per Patteson, J., Langford's case, Carr. & M.* 602.

Although the prisoners are charged only with a *beginning* to demolish, pull down, &c., yet it must appear that such a beginning was with intent to demolish the whole. The beginning to pull down, said Park, J., in a case where the prisoners were so charged, means not simply a demolition of a part, but of a part with intent to demolish the whole. If the prisoners meant to stop where they did (*i. e.* breaking windows and doors), and do no more, they are not guilty; but if they intended, when they broke the windows, &c., to go farther, and destroy the house, they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence that they meant the work of demolition to stop where it did. It was proved that the parties began by breaking the windows, and having afterwards entered the house, set fire to the furniture; but no part of the house was burnt. Park, J., said to the jury, "If you think the prisoners originally came, without intent to demolish, and that the setting fire to the premises was an afterthought, but with that intent, then, you must acquit, because no part of the house having been burnt, there was no beginning to destroy. If they came originally without such intent, but afterwards set fire to the house, the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner." *Ashton's case*, 1 *Lewin, C. C.* 296. The same rule was laid down in the two following cases:—The prisoners about midnight came to the house of the prosecutor, and having in a riotous manner burst open the door, broke some of the furniture, and all the windows, and did other damage, after which they went away, though there was nothing to prevent their committing further injury. Littledale, J., told the jury that this was not a "beginning to demolish," unless they should be satisfied that the ultimate object of the rioters was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. *Thomas's case*, 4 *C. & P.* 237; and see 6 *C. & P.* 333. See also *Adams's case, Carr. & M.* 301, where Coleridge, J., said to the jury, "before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this highly penal statute."

If in a case of feloniously demolishing a house by rioting, it appears that some of the prisoners set fire to the house itself, and that others carried furniture out of the house, and burnt it in a fire made on a gravel walk on the outside of the house, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture, and if so, the jury ought to convict them. *Per Tindal, C. J., R.* v. *Harris and others, Carr. & M.* 661. If a house be demolished by rioters by means of fire, one of the rioters who is present while the fire is burning, may

be convicted for the felonious demolition under the statute, although he is not proved to have been present when the house was originally set on fire. *Simpson's case*, *Carr. & M.* 669.

Where an election mob pursued a person who took refuge in a house, upon which they attacked the house, shouting, "pull it down," and broke the door and windows, and destroyed much of the furniture, but being unable to find the person they were in search of, went away; Tindal, C. J., ruled, that the case was not within the statute, the object of the rioters not being to destroy the house, but to secure the person they were in search of. *Price's case* 5 *C. & P.* 510. But the case may fall within the statute, though the intent to demolish may be accompanied with another intent, which may have influenced the conduct of the rioters. Thus, where a party of coal-whippers having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, collected a mob, and went to the house where he kept his pay-table, exclaiming, that they would murder him, and began to throw stones, &c., and broke the windows and partitions, and part of a wall, and after his escape, continued to throw stones, &c., till stopped by the police: Gurney, B., ruled that the parties might be convicted under the 7 & 8 Geo. 4, c. 30, s. 8, of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to demolish the house, on account of its having been used by him. *Batt's case*, 6 *C. & P.* 329.

On an indictment under this statute for riotously, &c., beginning to demolish and demolishing a dwelling-house, total demolition is not necessary, though the parties were not interrupted. If the house be destroyed as a dwelling it is enough. Four men, members of and connected with the family of the owner of the cottages, with great violence, and to his terror, drove him from it, and pulled it down all but the chimney: it was held sufficient to satisfy the statute though no other persons were within reach of the alarm; they having no *bonâ fide* claim of right, but intending to injure the owner. *Phillips's case*, 2 *Moo. C. C.* 252. If rioters destroy a house by fire, this is a felonious demolition of it within the statute, and the persons guilty of such an offence may be convicted on an indictment, founded on that enactment, and need not be indicted for arson under s. 2 of the same statute. *Per Tindal, C. J.*, *R.* v. *Harris and others*. *Carr. & M.* 661.

Proof of a rout.] A rout seems to be, according to the general opinion, a disturbance of the peace, by persons assembled together, with an intention to do a thing, which, if executed, would make them rioters, and actually making a motion towards the execution thereof. *Hawk. P. C. b.* 1, *c.* 65, *s.* 8; 1 *Russ. by Grea.* 266.

Proof of an unlawful assembly.] Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the king's subjects, seems properly to be called an unlawful assembly, as where great numbers complaining of a common grievance, meet together armed in a warlike manner, in order to consult respecting the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. *Hawk. P. C. b.* 1, *c.* 65, *s.* 9. The circumstances which constitute an unlawful assembly were much discussed in the case of *Redford* v. *Pirley*, 3 *Stark.*

N. P. C. 76. In that case, Holroyd, J., said, an unlawful assembly is where persons meet together in a manner and under circumstances which the law does not allow, but makes it criminal in those persons meeting together in such a manner, knowingly, and with such purposes as are in point of law criminal. He then proceeded to state what may constitute an unlawful assembly, adopting the language used by Bayley, J., in *Hunt's case* at York. All persons assembled to sow sedition, and bring into contempt the constitution, are an unlawful assembly. With regard to meetings for drillings, he said, if the object of the drilling is to secure the attention of the persons drilled to disaffected speeches, and give confidence by an appearance of strength to those willing to join them, that would be illegal; or if they were to say, we will have what we want, whether it be agreeable to law or not, a meeting for that purpose, however it may be masked, if it is really for a purpose of that kind would be illegal. If the meeting, from its general appearance, and all the accompanying circumstances, is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful. And it has been laid down by Alderson, B., that "any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage." *Vincent's case*, 9 *C. & P.* 91. All persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. *Per Littledale, J.*, *Neale's case*, *C. & P.* 431.

A question, with regard to the admissibility of evidence, showing previous meetings for the purpose of drilling, arose in *Hunt's case*, 3 *B. & A.* 566, which was an indictment containing counts for a conspiracy, unlawful assembly and riot; and in which the jury found the defendants guilty, on the count for an unlawful assembly. On a motion for a new trial, on the ground that this evidence had been improperly received, the application was rejected. Abbott, C. J., said, "It was shown that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies, to a certain extent arranged and organised, and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say, that they were left to the consideration of the jury in a manner less favourable to the defendants than the evidence warranted. And if this appearance was in itself proper for the consideration of the jury, it must have been proper to show to them, that at the very place from which one of these bodies came, a number of persons had assembled before day-break, and had been formed and instructed to march as soon as there was light enough for such an operation, and that some of the persons thus assembled had grossly ill-treated two others, whom

they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a king's man again, or to name the name of a king; and that another of the bodies that went to the place of meeting expressed their hatred towards this person by hissing as they passed his doors. These matters were in my opinion, unquestionably competent evidence upon the general character and intention of the meeting."

ROBBERY.

ROBBERY from the person, which is a felony at common law, is thus defined:—a felonious taking of money or goods of any value from the person of another, or in his presence against his will, by violence or putting him in fear. 2 *East, P. C.* 707.

Statute 7 Wm. 4 and 1 Vict. c. 87.] The 7 Wm. 4 and 1 Vict. c. 87, (E. & I.) by which the provisions of the 7 & 8 Geo. 4, c. 29, relating to this offence are repealed, abolishes the punishment of death for simple robbery, and restricts it to cases where the crime is attended with cutting or wounding.

Robbery attended with cutting or wounding.] By the 7 Wm. 4 and 1 Vict. c. 87, s. 2, "whosoever shall rob any person, and at the time of, or immediately before, or immediately after such robbery, shall stab, cut or wound, any person, shall be guilty of felony, and being convicted thereof shall suffer death."

This sentence may be recorded under the 4 Geo. 4.

The evidence to support an indictment under this section will be the same as that required on an indictment for simple robbery, see *post;* and in addition it must be proved that the prisoner either immediately before, at the time of, or immediately after the robbery, stabbed, cut, or wounded the prosecutor, as the case may be. With

respect to the evidence requisite to sustain the allegation of stabbing, &c. see *ante*, p. 765. If the prosecutor should fail to prove the stabbing, &c., the prisoner may still be convicted of the robbery, and if the proof of the latter should also fail, the party may be found guilty of an assault under the 14 & 15 Vict. c. 100, s. 11. That section enacts that "if upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

An indictment under the 7 Wm. 4 and 1 Vict. c. 87, s. 2, laying the wounding "at the time" is not sustained by evidence of wounding "immediately before." Alderson, B., advised that for the future there should be three counts laying the offence in each way. *Hammond's case*, 1 *Cox, C. C.* 123.

Robbery attended with violence, &c.] By the 7 Wm. 4 and 1 Vict. c. 87, s. 3, "whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more person or persons, rob, or assault with intent to rob any person, or shall rob any person, and at the time of, or immediately before, or immediately after such robbery, shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 10, in cases of imprisonment the court may award hard labour, and also solitary confinement not exceeding a month at one time, or three months in any one year.

The evidence to support an indictment founded on the third section of the above statute will depend upon the particular offence charged; whether it be a robbery, or an assault with intent to rob by a party armed with an offensive weapon; or by two or more persons; or whether such robbery be accompanied by striking or other personal violence. Should the prosecutor fail to make out the circumstances of aggravation, the prisoner may be convicted of the simple robbery, or if the proof be insufficient to support the latter charge, then of an assault.

The prisoner was charged under the last mentioned section with a robbery. The evidence was that the prisoner committed the offence together with others (who were not apprehended), but it was not so charged in the indictment. On the question whether, in order to bring him within the higher penalty imposed by that section, it ought not to have been so averred; Patteson, J., said, "where several parties are indicted for committing the offence, it is not necessary to aver that they were together; but if one be indicted alone who committed the act with others, it is proper it should be so averred." *Raffety's case*, 2 *Lew. C. C.* 271. See *R.* v. *Stringer*, *post.*

Simple robbery.] By the 7 Wm. 4 and 1 Vict. c. 87, s. 5, "whoever shall rob any person [or shall steal any property from the person of another, see as to this, title, *Larceny, ante*, p. 595,] shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years, nor less then ten years, or to be imprisoned for any term not exceeding three years."

The provisions of the statute with regard to stealing from the person; assaulting with intent to rob; and demanding property with menaces, or by force, with intent to steal; the accusing or threatening to accuse of any infamous crime; and the sending of threatening letters demanding money, are all separately noticed under distinct heads.

Evidence in cases of robbery.] On a prosecution for robbery, the evidence will be, 1st, proof that certain goods, &c. were taken; 2nd, that they were taken with a felonious intent; 3rd, from the person or in the presence of the owner; 4th, against his will; 5th, that they were taken, either by violence or by putting the owner in fear.

Proof of the goods, &c. taken.] It must be proved that some property was taken, for an assault with intent to rob is an offence of a different and inferior nature. 2 *East, P. C.* 707. But the value of the property is immaterial, a penny, as well as a pound, forcibly extorted, constitutes a robbery, the gist of the offence being the force and terror. 3 *Inst.* 69; 1 *Hale, P. C.* 532; 2 *East, P. C.* 707; 1 *Russ. by Grea*, 869; *R.* v. *Morris*, 9 *C. & P.* 349. Thus where a man was knocked down and his pockets rifled, but the robbers found nothing, except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. *Bingley's case, coram Gurney, B.*, 5 *C. & P.* 602. In the following case it was held that there was no property in the prosecutor so as to support an indictment for robbery. The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room for the purpose of extorting money from him. Upon a table covered with black silk were two candlesticks covered also with black, a pair of large horse pistols ready cocked, a tumbler glass filled with gunpowder, a saucer with leaden balls, two knives, one of them a prodigiously large carving knife, their handles wrapped in black crape, pens and inkstand, several sheets of paper, and two ropes. The prisoner, Mrs. Pipoe, seized the carving knife, and threatening to take away the prosecutor's life, the latter was compelled to sign a promissory note for 2000*l.* upon a piece of stamped paper which had been provided by the prisoner. It was objected that there was no property in the prosecutor, and the point being reserved for the opinion of the judges, they held accordingly. They said that it was essential to larceny, that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and ink were the property of Mrs. Phipoe, and the delivery of it by her to him, could not under the circumstances of the case be considered as vesting it in him, but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his

person, and it was well settled that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. *Phipoe's case*, 2 *Leach*, 673; 2 *East*, *P. C.* 599. See *Edward's case*, 6 *C. & P.* 515, 521, *post*, title *Threats*.

A servant, who had received money from his master's customers, was robbed of it in his way home. Upon its being objected that the money could not be laid as the property of the master, Alderson, B., inclined to think the objection valid, and would have reserved the point, but as the grand jury were sitting, the learned baron directed the jury to be discharged, and a new indictment to be preferred, containing a count laying the property in the servant. *Rudick's case*, 8 *C. & P.* 237.

Proof of the taking.] In order to constitute a *taking*, there must be a *possession* of the robber. Therefore, if a man having a purse fastened to his girdle is assaulted by a thief, who, in order more readily to get the purse, cuts the girdle, whereby the purse falls to the ground, this is no taking of the purse, for the thief never had it in his possession. 1 *Hale*, *P. C.* 533. But if the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, without taking it up again, it would have been robbery, for it would have been once in his possession. *Id.* However short the period of possession, it is sufficient. The prisoner taking the prosecutor's purse immediately returned it, saying, "If you value your purse you will please to take it back, and give me the contents of it;" the prosecutor took it back, and the prisoner at that moment was apprehended. The court (Hotham, B., and Willes, J.,) held, that though the prosecutor did not eventually lose either his purse or his money, yet as the prisoner had in fact demanded the money, and under the impulse of that threat and demand, the property had been once taken from the prosecutor by the prisoner, it was in strictness of law a sufficient *taking* to complete the offence, although the prisoner's possession had continued for an instant only. *Peat's case*, 1 *Leach*, 228; 2 *East*, *P. C.* 557. See *Lapier's case*, 1 *Leach*, 326, *ante*, p. 576. It has been observed with regard to cases of this description, that though it was formerly held that a sudden taking or snatching of any property from a person unawares was sufficient to constitute robbery, the contrary doctrine appears to be now established; (see *Gnosil's case*, 1 *C. & P.* 304), and that no taking by violence will at the present day be considered as sufficient to constitute robbery, unless some injury be done to the person (as in *Lapier's case*, *ante*, p. 576), or unless there be some previous struggle for the possession of the property, or some force used to obtain it. 1 *Russ. by Grea*, 871; *vide post.*

Proof of the taking—felonious intent.] The robbery must be *animo furandi*, with a felonious intent to appropriate the goods to the offender's own use. And there must be a felonious intent with regard to the goods charged in the indictment, it is not enough that the prisoner had at the same time an intent to steal other goods. A. assaulted B. on the highway with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of B.'s horse, and threw that and some bread which B. had in paniers about the highway, but did not take anything from B. Upon a conference

of all the judges, this was resolved to be no robbery. *Anon.* 2 *East, P. C.* 662.

Though the party charged take the goods with violence and menaces, yet if it be under a *bonâ fide* claim, it is not robbery. The prisoner had set wires in which game was caught. The gamekeeper finding them, was carrying them away when the prisoner stopped him, and desired him to give them up. The gamekeeper refused, upon which the prisoner lifting up a large stick, threatened to beat out the keeper's brains if he did not deliver them. The keeper fearing violence delivered them. Upon an indictment for robbery, Vaughan, B., said, "I shall leave it to the jury to say, whether the prisoner acted upon an impression, that the wires and pheasant were his own property, for, however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bonâ fide* impression, that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail." The prisoner was acquitted. *Hall's case*, 3 *C. & P.* 409. See also *Boden's case*, 1 *C. & K.* 395.

It sometimes happens that the original assault is not made with the particular felonious intent of robbing the party of the property subsequently taken; but if the intent arises before the property taken, it is sufficient; as where money, offered to a person endeavouring to commit a rape, is taken by him. The prisoner assaulted a woman, with intent to ravish her, and she without any demand made by him, offered him money, which he took, and put into his pocket, but continued to treat the woman with violence in order to effect his original purpose, till he was interrupted. A majority of the judges held this to be robbery, on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which, it was clear, she would not have done voluntarily, and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original attempt was to commit a rape. *Blackham's case*, 2 *East, P. C.* 711.

The question of the *animus furandi* often arises in cases where, after a quarrel and assault, part of the property of some of the parties engaged in the transaction has been carried away. The question in these cases is, whether the articles were taken in frolic, or from accident, or from malice, but not *animo furandi*. It is said, by a writer on the criminal law of Scotland, that it behoves prosecutors to be rigidly on their guard against such perversions of the real transaction which has occurred, and to endeavour to restrict charges of this serious description to cases of real felonious depredation. *Alison, Princ. Crim. Law of Scotl.* 238. Several cases, to illustrate this, are mentioned by Mr. Alison. A scuffle took place on the high road, between the prosecutor and the prisoner; in the course of which, the former was deprived of a ruling measure, his hat, and a quantity of articles out of his pockets, which were afterwards found by the road-side; but as it turned out, that he was tipsy at the time, and the articles might have been lost in the struggle, without any intent of felonious appropriation on the prisoner's part, he was acquitted. *Bruce's case, Alison, Prin. Crim. Law of Scotl.* 358. But, continues Mr. Alison, it may happen that an assault is commenced from some other motive, and in the course of it a depredation, done evidently *lucri causâ*, is committed, suggested perhaps by the unforeseen exposure of some valuable property, or the defenceless condition to which the owner is reduced in the course of the affray.

In such a case, it is not the less robbery that the intention to appropriate arose after the assault. The prisoner, from malice, lay in wait, and assaulted the witness; a scuffle ensued, during which the witness lost a bundle, which he never recovered. The court laid it down, that if the intention of depredation existed at the moment of the taking, the offence was robbery, though the assault commenced from a different motive; but the jury, doubting the evidence, acquitted of the robbery, and convicted only of the assault. *Young's case, Alison*, 239.

Proof of the taking—from the person.] It is not necessary that the goods should actually be taken from off the person of the prosecutor; if they are in his personal custody, and are taken in his presence, it is sufficient. But it is otherwise, where they are in the personal custody of a third person. The two prisoners were indicted for assaulting the prosecutor, and robbing him of a bundle. It appeared that the prosecutor had the bundle in his own personal custody, in a beer-shop, and when he came out, gave it to his brother, who was with him, to carry it for him. While on the road, the prisoners assaulted the prosecutor; upon which, his brother laid down the bundle in the road and ran to his assistance. One of the prisoners then took up the bundle, and made off with it. Vaughan, B., intimated an opinion, that the indictment was not maintainable, as the bundle was in the possession of another person at the time of the assault committed. Highway robbery was the felonious taking of the property of another by violence, against his will, either from his person or in his presence. The bundle, in this case, was not in the prosecutor's possession. If the prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it? The prisoners were convicted of simple larceny. *Fallows's case*, 5 *C. & P.* 508.

Proof of the taking—in presence of the owner.] The taking need not be by the immediate delivery of the party to the offender, or immediately from the person of the party robbed; it is sufficient if it be in his presence. The instances given by Lord Hale are, where a carrier is driving his pack-horses, and the thief takes his horse or cuts his pack, and takes away the goods; or where a thief comes into the presence of A., and with violence, and putting A. in fear, drives away his horse, cattle, or sheep. 2 *Hale, P. C.* 533. But it must appear in such cases, that the goods were taken in the presence of the prosecutor. Thus where thieves struck money out of the owner's hand, and by menaces drove him away, to prevent his taking it up again, and then took it up themselves; these facts being stated in a special verdict, the court said that they could not intend that the thieves took up the money in the sight or presence of the owner, and that, as the striking the money out of the hand was without putting the owner in fear, there was no robbery. *Francis's case*, 2 *Str.* 1015, *Com. Rep.* 478; 2 *East, P. C.* 708. And the same was resolved in another case, with the concurrence of all the judges. *Grey's case*, 2 *East, P. C.* 708. Where robbers, by putting in fear, made a waggoner drive his waggon from the highway, in the day-time, but did not take the goods till night; some held it to be a robbery from the first force, but others considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves. 2 *East, P. C.* 707; 1 *Russ. by Grea.* 873.

Proof of the taking—against the will of the owner.] It must appear that the taking was against the will of the owner. Several persons conspired to obtain for themselves the rewards given by statute for apprehending robbers on the highway. The robbery was to be effected upon Salmon, one of the confederates, by Blee, another of the confederates, and two strangers procured by Blee. It was expressly found, that Salmon consented to part with his goods under pretence of a robbery, and that, for that purpose, he went to a highway, at Deptford, where the colourable robbery took place. The judges were of opinion that this did not amount to robbery in any of the prisoners, because Salmon's property was not taken from him against his will. *M'Daniel's case, Fost.* 121, 122. But it is otherwise where the party robbed delivers money to the thief, though, at the same time, with the intent and power of immediately apprehending him. One Norden, having been informed of several robberies by a highwayman, resolved to apprehend him. For this purpose, he put a little money and a pistol in his pocket, and took a chaise. The robber stopped the chaise, and demanded money. Norden gave him what money he had, jumped out of the chaise with the pistol in his hand, and with some assistance apprehended the prisoner. The prisoner was convicted of this robbery, and the conviction was approved of by Mr. Justice Foster, who distinguishes it from the former case, on the ground that there was no concert or connection between Norden and the highwayman. *Anon. Foster*, 129.

Proof of the violence or putting in fear—violence—degree.] It must be proved that the goods were taken either by violence, or that the owner was put in fear; but either of these facts will be sufficient to render the felonious taking a robbery. 2 *East, P. C.* 708; 1 *Russ. by Grea.* 874. Where violence is used, it is not necessary to prove actual fear. "I am very clear," says Mr. Justice Foster, "that the circumstances of actual fear, at the time of the robbery, need not be strictly proved. Suppose the man is knocked down, without any previous warning to awaken his fears, and lies totally insensible, while the thief rifles his pockets, is not this a robbery?" *Foster*, 128. And if fear be a necessary ingredient, the law *in odium spoliatoris* will presume it, where there appears to be so just a ground for it. *Id.* 2 *East, P. C.* 711.

With regard to the degrees of violence necessary, it has been seen, *ante*, p. 880, that the sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is not sufficient to constitute robbery, unless some injury be done to the person, or unless there be some previous struggling for the possession of the property. In *Lapier's case, ante*, p. 576, it was held robbery, because an injury was done to the person. 2 *East, P. C.* 709. A boy was carrying a bundle along the street, when the prisoner ran past him, and snatched it suddenly away, but being pursued, let it fell. Being indicted for robbery, the court (Hotham, B., and Adair, serjeant,) said, the evidence in this case does not amount to a robbery; for though he snatched the bundle, it was not with that degree of force and terror that is necessary to constitute this offence. *Macauley's case*, 1 *Leach*, 287. And the same has been resolved in several other cases, in which it has appeared that there was no struggle for the property. *Baker's case*, 1 *Leach*, 290; *Robins's case, Id.* (*n*); *Davies's case*, (*Id.* (*n*); *Horner's case, Id.* 191, (*n*). In *Hughes's case*, 2 *C. & K.* 214, where the prisoner having asked the prosecutor to

tell him the time, and the prosecutor having taken out his watch in order to answer the prisoner, holding it loosely in both hands, the prisoner caught hold of the ribbon and snatched the watch away, and made off with it; Patteson, J., held that this was not a robbery, but a stealing from the person.

But where a degree of violence is used sufficient to cause a personal injury, it is robbery; as where, in snatching a diamond pin fastened in a lady's hair, part of the hair was torn away at the same time. *Moore's case*, 1 *Leach*, 335, and see *Lapier's case*, *Id.* 320, *ante*, p. 576. A case is said to have been mentioned by Holroyd, J., which occurred at Kendal, and in which the evidence was that a person ran up against another, for the purpose of diverting his attention while he picked his pocket; and the judges held, that the force was sufficient to make it robbery, it having been used with that intent. *Anon.* 1 *Lewin*, *C. C.* 300. It appeared in evidence that the prisoner and others, in the streets of Manchester, hung around the prosecutor's person, and rifled him of his watch and money. It did not appear that any actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not vain. Bayley, J., on the trial of these parties for robbery, said, in order to constitute robbery, there must be either force or menaces. If several persons surround another so as to take away his power of resistance, this is robbery. *Hughes's case*, 1 *Lewin*, *C. C.* 301.

So if there be a struggle between the offender and the owner, for the possession of the property, it will be held to be such a violence as to render the taking robbery. The prisoner was indicted for taking a gentleman's sword from his side, *clam et secrete*; but, it appearing that the gentleman perceived the prisoner had laid hold of his sword, and that he himself laid hold of it at the same time and struggled for it, this was adjudged a robbery. *Davies's case*, 2 *East*, *P. C.* 709. The prisoner coming up to the prosecutor in the street, laid violent hold of the seals and chains of his watch, and succeeded in pulling it out of his fob. The watch was fastened with a steel chain, which went round his neck, and which prevented the prisoner from immediately taking the watch; but, by pulling, and two or three jerks, he broke the steel chain and made off with the watch. It was objected that this came within the cases as to snatching; but the judges, on a case reserved, were unanimously of opinion that the conviction was right, for that the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for that purpose. *Mason's case*, *Russ. & Ry.* 419.

In order to constitute the offence of robbery, not only force must be employed by the party charged therewith, but it is necessary to show that such force was used with the intent to accomplish the robbery. Where, therefore, it appeared that a wound had been accidentally inflicted in the hand of the prosecutrix, it was held by Alderson, B., that an indictment for robbing could not be sustained. *R.* v. *Edwards*, 1 *Cox*, *C. C.* 32.

An indictment for robbery which charges the prisoners with having assaulted G. P. and H. P., and stolen 2*s.* from G. P., and 1*s.* from H. P., is correct, if the robbery of G. P. and H. P. was all one act; and if it were so, the counsel for the prosecution will not be put to elect. *R.* v. *Giddins*, *Carr. & M.* 634.

Proof of violence—under pretence of legal or rightful proceedings.] Violence may be committed as well by actual unlawful force, as under

pretence of legal and rightful proceedings. Merriman, carrying his cheeses along the highway in a cart, was stopped by one Hall, who insisted on seizing them for want of a permit (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary). On an altercation, they agreed to go before a magistrate and determine the matter. In the mean time other persons, riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the purpose, carried off the goods in Merriman's absence. It was objected that this was no robbery, there being no force used; but Hewitt, J., overruled the objection, and left it to the jury, who, found it robbery, and brought in a verdict for the plaintiff; and, upon a motion for a new trial in K. B., the court held that the verdict was right. *Merriman* v. *Hundred of Chippenham*, 2 *East*, *P. C.* 709.

The prosecutrix was brought before a magistrate by the prisoner, into whose custody she had been delivered by a headborough, on a charge of assault. The magistrate recommended the case to be made up. The prisoner (who was not a peace officer) then took her to a public-house, treated her very ill, and finally handcuffed and forced her into a coach. He then put a handkerchief into her mouth, and forcibly took from her a shilling, which she had previously offered him, if he would wait till her husband came. The prisoner then put his hand in her pocket, and took out three shillings. Having been indicted for this as a robbery, Nares, J., said, that, in order to commit the crime of robbery, it was not necessary the violence used to obtain the property should be by the common modes of putting a pistol to the head, or a dagger to the breast: that a violence, though used under a colourable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, that if they thought the prisoner had, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making a resistance, and took the money with a felonious intent, they should find him guilty. The jury having found accordingly, the judges, upon a case reserved, were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence he had committed was clearly a robbery. *Gascoigne's case*, 1 *Leach*, 280; 2 *East*, *P. C.* 709.

Proof of putting in fear—mode of putting in fear.] If there has not been such violence used, as to raise the offence from that of simple larceny to that of robbery, the prosecutor must show that he was *put in fear*—a fear of injury either to his person, his property, or his reputation.

In order to show a putting in fear, it is not necessary to prove that menaces or threats of violence were made use of by the offender. For instance, under pretence of begging, the prisoner may put the prosecutor in fear. The law (says Mr. Justice Willes), will not suffer its object to be evaded by an ambiguity of expression; for, if a man, *animo furandi*, says, "Give me your money;" "lend me your money;" "make me a present of your money;" or words of the like import, they are equivalent to the most positive order or demand; and if anything be obtained in consequence, it will form the first ingredient in the crime of robbery. *Donnally's case*, 1 *Leach*, 196.

During the riots in London, in 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, and on his opening it said, "God bless your honour, remember the poor mob." The prosecutor told him to go along; upon which he said he would go and fetch his captain. He went, and soon after the mob came, to the number of 100, armed with sticks, and headed by the prisoner on horseback, his horse led by the boy. The by-standers said, "You must give them money." The boy said, "Now I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor asked the prisoner "how much;" and he answered "half-a-crown;" on which the prosecutor, who had before intended to give only a shilling, gave the prisoner half-a-crown, and, the mob giving three cheers, went to the next house. This was held to be robbery, by Nares, J., and Buller, J., at the old bailey. *Taplin's case*, 2 *East*, *P. C.* 712.

There may be a putting in fear where the property is taken under colour of regular or legal proceedings, as well as in cases where it is taken by actual violence. See the cases cited *ante*, p. 884.

So there may be a putting in fear where the robbery is effected under colour of a purchase. Thus, if a person, by force or threats, compel another to give him goods, and by way of colour oblige him to take less than the value, this is robbery. As where the prisoner took a bushel and a half of wheat worth 8*s*., and forced the owner to take 13*d*. for it, threatening to kill her if she refused, it was clearly held by all the judges to be a robbery. *Simon's case*, 2 *East*, *P. C.* 712. Again, where the prisoner and a great mob came to the prosecutor, who had some corn, and one of them said, if he would not sell they were going to take it away; and the prisoner said they would give him 30*s*. a load, and if he would not accept that they would take the corn away; upon which the prosecutor sold it for 30*s*. though it was worth 38*s*., this was held to be robbery. *Spencer's case*, 2 *East*, *P. C.* 712.

In these cases the amount of the money may raise a question for the jury, whether or not the taking was felonious; for though there may be a putting in fear, yet if, in fact, the party had not the *animus furandi*, it is no felony. A traveller met a fisherman with fish, who refused to sell him any; and he, by force and putting in fear, took away some of his fish, and threw him money much above the value of it. Being convicted of robbery, judgment was respited, because of the doubt whether the intent was felonious. The *Fisherman's case*, 2 *East*, *P. C.* 661. It has been observed that this was properly a question for the jury to say whether, from the circumstance of the party's offering the full value, his intention was not fraudulent, and consequently not felonious. 2 *East*, *P. C.* 662. If the original taking was felonious the payment would make no distinction.

One of the most common modes of effecting a robbery is by menaces and threats. These are said to be a constructive violence, and as such sufficient to render the felonious taking of goods from the person robbery. But it is not every species of threat that will be accounted sufficient for this purpose. The distinction is well stated by a writer on the criminal law of Scotland, which, in this respect, corresponds with our own. If, says Mr. Alison, the threat be of instant, or near and personal danger, as if matches be exhibited, by which it is proposed immediately to set fire to the house, or cords be produced for binding the person, preparatory to dragging him on a false charge to gaol, there seems no difference between such a case and the extortion

of money by the menaces of immediate death. But if the threat be of a future or contingent danger, and such as by the interposition of law, or by other means may be averted, the crime is not to be considered as robbery, but as oppression, which is a crime *sui generis*: more especially, if, in consequence of such threats, the money be delivered not *immediately*, but *ex intervallo*, as by sending it by letter, placing it under a stone designed by the criminal, or the like. In such cases the crime is not considered as robbery, any more than if the money had been obtained under the terror of an incendiary letter. *Alison, Princ. Crim. Law of Scotl.* 231.

Proof of putting in fear—the degree of fear.] It is a question for the jury, whether the circumstances accompanying the commission of the offence were such as reasonably to create fear in the breast of the party assaulted; and it can seldom happen that such a presumption may not properly be made. It is not, says Willes, J., necessary that there should be *actual danger*, for a robbery may be committed without using an offensive weapon, as by using a tinder-box or candlestick instead of a pistol. A reasonable fear of *danger* caused by the exercise of a constructive violence is sufficient, and where such a terror is impressed upon the mind, as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it against his will. Nor need the degree of constructive violence be such, as in its effects necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go. *Donnally's case*, 1 *Leach*, 196, 197; 2 *East, P. C.* 727. The rule, as deduced from the last cited case, is thus laid down by Mr. East. On the one hand the fear is not confined to an apprehension of bodily injury, and on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence or assault upon the person. 2 *East, P. C.* 713; *Ibid.* 727.

In *Jackson's case*, 1 *East*, it seems to have been considered that the fear must be of that description which will operate *in constantem virum*. That case, however, was one of a peculiar nature, and it certainly cannot be required, in order to constitute a robbery, in every case, that the terror impressed should be that of which a man of constancy and courage would be sensible. It has been well remarked, that in estimating the degree of violence, which will be held sufficient to support a charge of robbery, regard is to be had to the age, sex, and situation of the party assaulted, it being justly deemed that a much smaller degree of threats and violence will be sufficient to effect the spoliation from a woman or an infirm person, in a remote situation, than from a young or robust man in a frequented spot. *Alison, Princ. Crim. Law of Scotl.* 229; *Burnett*, 146.

Proof of being put in fear—injury to the person.] Proof of such circumstances as may reasonably induce a fear of personal injury, will be sufficient to support the charge of robbery. It would not be sufficient to show in answer that there was no real danger, as that

the supposed pistol was in fact a candlestick, see *suprà;* in short, danger to the person may be apprehended from every assault with intent to rob, and a jury would be justified in presuming that the party assaulted was under the influence of fear with regard to her personal safety. It seems also, that fear of violence to the person of the child of the party whose property is demanded, is regarded in the same light as fear of violence to his own person. Hotham, B., in *Donnally's case*, 2 *East*, *P. C.* 718, stated, that with regard to the case put in argument, if a man walking with his child, and delivering his money to another, upon a threat, that unless he did so, he would destroy the child, he had no doubt but that it was sufficient to constitute a robbery. So in *Reane's case*, 2 *East*, *P. C.* 735, Eyre, C. J., observed, that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.

Proof of the putting in fear—fear of injury to property.] It is sufficient to prove that the conduct of the prisoner put the prosecutor in fear for the safety of his *property*. During certain riots in Cornwall, the prisoners, with a mob, came to the prosecutor's house, and said they must have from him the same they had had from his neighbours, which was a guinea, else that they would tear down his mow of corn and level his house. The prosecutor gave them 5*s*., but they demanded and received 5*s*. more, he being terrified. They then opened a cask of cider and drank part of it, eat some bread and cheese, and the prisoners carried away a piece of meat. The prisoners were indicted and convicted of robbing the prosecutor of 10*s*. There was also another count for putting the prosecutor in fear, and taking from him, in his dwelling-house, a quantity of cider, &c., and it was held robbery in the dwelling-house. *Simons's case*, 2 *East*, *P. C.* 731. During the Birmingham riots the mob entered the house, and the prisoner, who was one of them, demanded money, and said, that if the prosecutor did not give his men something handsome for them to drink, his house must come down. The jury found that the prosecutor did not deliver his money from any apprehension of danger to his life or person, but from an apprehension, that if he refused, his house would at some future time be pulled down in the same manner as other houses in Birmingham. On a case reserved, a majority of the judges held this to be robbery. *Astley's case*, 2 *East*, *P. C.* 729; see also *Brown's case*, 2 *East*, *P. C.* 731; *Spencer's case*, 2 *East*, *P. C.* 712, *ante*, p. 886.

Proof of being put in fear—fear of injury to reputation.] There appears to be only one case in which the fear of an injury to the party's reputation has been allowed to raise the offence of larceny from the person to robbery, *viz.*, where the prisoner has threatened to accuse the prosecutor of unnatural practices. The species of terror, says Mr. Justice Ashurst, which leads a man to apprehend an injury to his character, has never been deemed sufficient, unless in the particular case of exciting it by means of insinuations against, or threats to destroy, the character of the party pillaged, by accusing him of sodomitical practices. *Knewland's case*, 2 *Leach*, 730. The rule is laid down in the same case, in rather larger terms, by Mr. Justice Heath, who says, "The cases alluded to (*Donnally's case*, and *Hickman's case*, *infra*), only go thus far—that to obtain money from a

person by accusing him of that which, if proved, would carry *with it an infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided that a mere charge of imprisonment and extortion is sufficient. 2 *Leach*, 729.

That obtaining money from a man by threatening to accuse him of unnatural practices amounts to a robbery, was decided in *Jones's case*. The prisoner, drinking with the prosecutor at a public-house, asked him what he meant by the liberties he had taken with his person at the play-house. The prosecutor replied, that he knew of no liberties having been taken; upon which the prisoner said, "Damn you, sir, but you did, and there were several reputable merchants in the house, who will take their oaths of it." The prosecutor being alarmed, left the house; but the prisoner following him, cried out, "Damn you, sir, stop, for if you offer to run, I will raise a mob about you;" and seizing him by the collar, continued, "Damn you, sir, this is not to be borne, you have offered an indignity to me, and nothing can satisfy it." The prosecutor said, "For God's sake, what would you have?" To which the prisoner answered, "A present; you must make me a present." And the prosecutor gave him three guineas and twelve shillings. The prisoner during the whole conversation, held the prosecutor by the arm. The prosecutor swore, that at the time he parted with the money, he understood the threatened charge to be an imputation of sodomy; that he was so alarmed at the idea, that he had neither courage nor strength to call for assistance; and that the violence with which the prisoner had detained him in the street, had put him in fear for the safety of his person. Upon a case reserved, the judges (absent De Grey, C. J., and Ashurst, J., and one vacancy), were of opinion, that although the money had been obtained in a fraudulent way, and under a false pretence, yet, that it was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it to constitute the offence of robbery. According to the report of the same case by Mr. East, their lordships said, that to constitute robbery there was no occasion to use weapons or real violence, but that taking money from a man in such a situation as rendered him not a free man, as if a person so robbed was in fear of a conspiracy against his life or character, was such a putting in fear as would make the taking of his money under that terror, robbery; and they referred to *Brown's case, O. B.* 1763; *Jones's case*, 1 *Leach*, 139; 2 *East, P. C.* 714.

In the above case it does not clearly appear, whether the judges held it to be robbery, on the ground of the actual violence offered to the prosecutor in detaining him in the street by the arm, or upon the prosecutor being put in fear of an injury to his reputation by the menaces employed. However, in subsequent cases it has been held, that it is no less robbery where no personal violence whatever has been used.

The prosecutor, passing along the street, was accosted by the prisoner, who desired he would give him a present. The prosecutor asking, for what? the prisoner said, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea. Two days afterwards, the prisoner obtained a further sum of money from the prosecutor by similar threats. The prosecutor swore that he was exceedingly alarmed upon both occasions, and under that alarm gave the money; that he was not aware what were the con-

sequences of such a charge; but apprehended that it might cost him his life. The jury found the prisener guilty of the robbery, and that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. The case being reserved for the opinion of the judges, they gave their opinions *seriatim* (see 2 *East*, *P. C.* 716), and afterwards the result of their deliberations was delivered by Mr. Justice Willes. They unanimously resolved, that the prisoner was rightly convicted of robbery. This, says Mr. Justice Willes, is a threat of personal violence; for the prosecutor had every reason to believe that he should be dragged through the streets as a culprit, charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money. *Donnally's case*, 1 *Leach*, 193; 2 *East*, *P. C.* 713.

It will be observed, that in the foregoing case the jury found that the prisoner delived the money under an apprehension that his life was in danger; but this circumstance was wanting in the following case, where the only fear was, that of an injury to the party's reputation:

The prosecutor was employed in St. James's Palace, and the prisoner was sentinel on guard there. One night the prosecutor treated the prisoner with something to eat in his room. About a fortnight afterwards, the prisoner followed the prosecutor up stairs, and said, "I am come for satisfaction, you know what passed the other night. You are a sodomite; and if you do not give me satisfaction, I will go and fetch a serjeant and a file of men, and take you before a justice, for I have been in the black-hole ever since I was here last, and I do not value my life." The prosecutor asked him what money he must have, and he said three or four guineas, and the prosecutor gave him two guineas. The prisoner took them, saying, "Mind, I don't *demand* any thing of you." The prosecutor swore that he was very much alarmed when he gave the two guineas, and that he did not very well know what he did; but that he parted with the money under an idea of preserving his character from reproach, and not from the fear of personal violence. The jury found the prisoner guilty of the robbery, and they also found that the prosecutor parted with the money against his will, through a fear that his character might receive an injury from the prisoner's accusation. The case, being only the second of the kind (*sed vide Jones's case*, *ante*, p. 889), and some doubt having prevailed with regard to *Donnally's case*, because he had not been executed, and because this case differed with regard to the nature of the *fear*, it was reserved for the opinion of the judges. Their resolution was delivered by Mr. Justice Ashurst, who said, that the case did not materially differ from that of *Donnally*, for that the true definition of robbery is, the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or terror as to induce the party unwillingly to part with his property; and whether the *terror* arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges were unanimously of

opinion, that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes, was a sufficient *force* to constitute the crime of robbery by putting in fear. *Hickman's case*, 1 *Leach*, 278; 2 *East. P. C.* 728.

This decision has since been followed. The prisoner came up to the prosecutor, a gentleman's servant, at his master's door, and demanded 5*l.* On being told by the prosecutor that he had not so much money, he demanded 1*l.*, and said, that if the prosecutor did not instantly give it to him, he would go to his master, and accuse him of wanting to take diabolical liberties with him. The prosecutor gave him what money he had, and the prisoner demanded his watch, or some of his master's plate. This the prosecutor refused; but went and fetched one of his coats, which the prisoner took away. He was indicted for robbing the prosecutor of his coat. The prosecutor swore that he gave the prisoner his property, under the idea of his being charged with a detestable crime, and for fear of losing both his character and his place. He stated that he was not afraid of being taken into custody, nor had he any dread of punishment. He stated also, that he was absent fetching the coat, for five minutes; that the servants were in the kitchen, but he did not consult them on account of his agitation, and because he had not a minute to spare, expecting the company to dinner immediately. On a case reserved, eleven of the judges thought the case similar to *Hickman's* (*supra*), and that they could not, with propriety, depart from that decision. Graham, B., thought that *Hickman's case* was not rightly decided, but said that he should on this point be influenced in future by what appeared to be the general opinion of the judges. *Egerton's case*, *Russ. & Ry.* 375.

Upon a threat of accusing the prosecutor of unnatural practices, he promised to provide a sum of money for the prisoners, which he failed to do, upon which they said they were come from Bow-street, and would take him into custody. They accordingly called a coach, and while on their road to Bow-street, one of the prisoners stopped the coach, and said that if the prosecutor would behave like a gentleman and procure the money, they would not prefer the charge. The prosecutor then went to the house of a friend, where he was absent about five minutes, when he returned with 10*l.*, which he gave to the prisoners. He stated that he parted with his money in the fear and dread of being placed in the situation of a criminal of that nature, had they persisted in preferring the charge against him; that he did not conceive they were Bow-street officers, though they held out the threat; that he was extremely agitated, and thought that they would have taken him to the watch-house, and under that idea, and the impulse of the moment, he parted with the money. He stated also, that he could not say that he gave his money under any apprehension of danger to his person.

In a case of this kind, where the point of violence was in question, ten of the judges were of opinion, that the calling of a coach, and getting in with the prosucutor, was a forcible constraint upon him, and sufficient to constitute a robbery, though the prosecutor had no apprehension of further injury to his person. Lord Ellenborough, Macdonald, C. B., Lawrence, J., Chambre, J., and Graham, B., thought some degree of force or violence essential; and that the mere apprehension of danger to the character would not be sufficient to constitute this offence. Heath, J., Grose, J., Thomson, B., Le

Blanc, J., and Wood, B., seemed to think it would. *Cannon's case, Russ. & Ry.* 146.

The threat in these cases must be a threat to accuse the party robbed; it is not sufficient to constitute robbery that the threat is to accuse another person, however nearly connected with the party from whom the property is obtained. The prisoner was indicted for robbing the wife of P. Abraham. It appeared, that under a threat of accusing Abraham of an indecent assault, the money had been obtained, by the prisoner, from Abraham's wife. Littledale, J., said, "I think this is not such a personal fear in the wife, as is necessary to constitute the crime of robbery. If I were to hold this a robbery, it would be going beyond any of the decided cases;" and his lordship directed an acquittal. He said that the case was new and perplexing. He thought it was rather a misdemeanor; and even as a misdemeanor, the case was new. The principle was, that the person threatened is thrown off his guard, and has not firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened. *Edward's case*, 1 *Moo. & R.* 257; 5 *C. & P.* 518.

Where the fear, in cases of this nature, is not so much of injury to the reputation, as of some other loss, it seems doubtful how far it will be considered robbery. The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite. The prosecutor took him each time before a magistrate, who discharged him. On being discharged, the prisoner followed the prosecutor, repeated the expressions, and asked him to make him a present, saying, he would never leave him till he had pulled the house down; but if he did make him a handsome present, he would trouble him no more. He mentioned four guineas, and the prosecutor being frightened for his reputation, and in fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted; but a doubt arising in the privy-council, the opinion of the judges was taken. Most of them thought that this was within *Hickman's case*, and nine were of opinion that that case was law, but the three others thought it not law. Lord Ellenborough thought that the prosecutor's principal inducement to part with his money was the fear of the loss of his place, and he said he should feel no difficulty in recommending a pardon; and the prisoner did, in the end, receive a pardon. *Elmstead's case, Russ. by Grea.* 894.

In these, as in other cases of robbery, it must appear that the property was delivered, or the money extorted, while the party was under the influence of the fear arising from the threats or violence of the prisoner. The prosecutor had been several times solicited for money by the prisoner, under threats of accusing him of unnatural practices. At one of those interviews the prisoner said he must have 20*l.* in cash, and a bond for 50*l.* a-year; upon which the prosecutor, in pursuance of a plan he had previously concerted with a friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and bond. At their next interview, the prosecutor offered the prisoner 20*l.*, but he refused to take it without the bond, upon which the prosecutor fetched it, and gave it, with nineteen guineas and a shilling, to the prisoner, who took them away, saying, he would not give the prosecutor any further trouble. The prosecutor deposed, that when the charge was first made, his mind was extremely alarmed, and that he apprehended injury to his person and character, but that his fear soon subsided, and that he sought the

several interviews with the prisoner for the purpose of parting with his property to him, in order to fix him with the crime of robbery, and to substantiate the fact of his having extorted money from him by means of the charge; but that at the time the prisoner demanded from him the money and the bond, he parted with them without being under any apprehension, either of violence to his person or injury to his character, although he could not say that he parted with his property voluntarily. The judges having met to consider this case, were inclined to be of opinion that it was no robbery, their being no violence nor fear, at the time when the prosecutor parted with his money. Eyre, C. J., observed, that it would be going a step further than any of the cases, to hold this to be robbery. The principle of robbery was violence; where the money was delivered through fear, that was constructive violence. That the principle he had acted upon in such cases was, to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, where the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoner, he negatived the robbery. That this was different from *Norden's case, Foster*, 129, where there was actual violence; but here there was neither actual nor constructive violence. At a subsequent meeting of the judges, the conviction was held wrong. *Reane's case*, 2 *Leach*, 616; 2 *East*, *P. C.* 734. The same point was ruled in *Fuller's case*, *Russ. & Ry.* 408, where the prosecutor made an appointment to meet the prisoner, and in the meantime procured a constable to attend, who, as soon as the prisoner received the money, apprehended him. The prosecutor stated that he parted with the money, in order that he might prosecute the prisoner.

Under the circumstances of the following case, it appears to have been held that the fear was not continuing at the time of the delivery of the money, and that therefore it was no robbery: In consequence of a charge similar to that in the above cases having been made, the prosecutor procured a sum of money to comply with the demand, and prevailed upon a friend to accompany him when he went to pay it. His friend (Shelton) advised him not to pay it, but he did pay it. He swore that he was scared at the charge, and that was the reason why he parted with his money. It appeared that, after the charge was first made, the prosecutor and one of the prisoners, continued eating and drinking together. Shelton confirmed the prosecutor's account, and said he appeared quite scared out of his wits. The judges having met to consider this case, a majority of them were of opinion that it was not robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character was upon him at the time. Most of the majority thought that, in order to constitute robbery, the money must be parted with from an immediate apprehension of present danger *upon the charge* being made, and not, as in this case, after the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance, and had applied to a friend, by whom he was advised not to pay it; and who was actually present at the very time when it was paid; all which carried the appearance more of a composition of a prosecution than it did of a robbery, and seemed more like a calculation, whether it were better to lose his money or risk his character. One of the judges, who agreed that it was not robbery, went upon the ground that there was not a continuing fear, such as could operate *in constantem virum*, from the time when the money was

demanded till it was paid; for in the interval he could have procured assistance, and had taken advice. The minority, who held the case to be robbery, thought the question concluded by the finding of the jury that the prosecutor had parted with his money through fear continuing at the time, which fell in with the definition of robbery long ago adopted and acted upon, and they said it would be difficult to draw any other line; and that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for their assistance, for the money was given to prevent the public disclosure of the charge. *Jackson's case*, 1 *East, P. C. Addenda*, xxi. It is suggested by Mr. East, *Id.* xxiv. (*margin*), whether this case does not in a great measure overrule *Hickman's case*, *ante*, p. 891; but it is justly observed by an eminent writer, that the circumstances of the two cases differ materially; that in *Hickman's case* the money was given *immediately* upon the charge being made, and that there was no previous application to any friend or other person from whom advice or assistance might have been procured. 2 *Russ. by Grea.* 894.

So much doubt appears to have been entertained with regard to the law as it is to be gathered from the preceding cases, that a statutory provision was made on the subject. The statute 7 Wm. 4 & 1 Vict. c. 87, s. 4, repealing the former statute, 7 & 8 Geo. 4, c. 29, s. 7, enacts, that "whosoever shall accuse, or threaten to accuse any person of the abominable crime of buggery committed either with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person, whereby to move or induce such to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid, to extort or gain from such person, and shall by intimidating such person by such accusation or threat extort or gain from such person any property, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." And see *post*, *tit. Threats*.

Patteson, J., held, that a threatening to accuse, under the 7 & 8 Geo. 4, c. 29, s. 7, need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person was enough. The learned judge said that the term "accuse" throughout the act meant to charge the prosecutor before any third person; and "threatening to accuse" meant threatening to accuse before any third person. *Robinson's case*, 2 *Moo. & R.* 14; 2 *Lew. C. C.* 273.

On an indictment under the 1 Vict. c. 87, s. 4, *supra*, Park, J. (after conferring with Parke, B.), told the jury, that they need not confine themselves to the consideration of the expressions used before the money was given; but might, if those expressions were equivocal, connect with them what was afterwards said by the prisoners when taken into custody. *Kain's case*, 8 *C. & P.* 187.

Where the words used by the prisoner were, "If you do not assist me, I will say you took indecent liberties with me some time ago;" Law, recorder, held, that they were not sufficient to sustain a count founded on 1 Vict. c. 87, s. 4, as the threat must be to accuse of an attempt to commit the complete capital offence. *Norton's case*, 8 *C. & P.* 671.

Semble that now, where money is obtained by any of the threats to accuse specified in that section, the indictment must be on the statute; but where the money is obtained by threats to accuse other than those specified in the act, the indictment may be for robbery if the party was put in fear, and parted with his property in consequence. *Norton's case, supra.* In a note to this case the recorder is stated to have mentioned it to Parke, B., who concurred in the above opinion. 1 *Russ. by Grea.* 900 (*n*). It was held on a case reserved, that since the 1 Vict. c. 87, s. 4, an indictment in the ordinary form for robbery cannot be supported by proof of extorting money by threats of charging an infamous crime, and that a person present to aid A. B. to extort money by such charges, cannot be convicted of robbery with A. B. effected by him with actual violence, the prisoner being no party to such violence. *Henry's case*, 2 *Moo. C. C.* 118; 9 *C. & P.* 309. But it has since been decided, that assaulting and threatening to charge with an infamous crime (but in terms not within the above section), with intent thereby to extort money, was an assault with intent to rob. *Stringer's case*, 2 *Moo. C. C.* 361; 1 *C. & K.* 188. In this latter case the judges doubted whether *R.* v. *Henry* was rightly decided on the ground on which it was decided, viz., that it was not robbery to obtain money by threat of a charge of sodomy.

It is no defence to a charge of robbery by threatening to accuse a man of an unnatural crime, that he has in fact been guilty of such crime. Where the prisoner set up that defence, and stated that the prosecutor had voluntarily given him the money not to prosecute him for it; Littledale, J., said, that it was equally a robbery to obtain a man's money by a threat to accuse him of an infamous crime, whether the prosecutor were really guilty or not; as if he was guilty, the prisoner ought to have prosecuted him for it, and not to have extorted money from him; but if the money was given voluntarily without any previous threat, the indictment could not be supported. The jury acquitted the prisoner. *Gardner's case*, 1 *C. & P.* 479. See also, *post, tits. Threats, Accusing of Infamous Crimes.*

The following case appears to have been regarded as ranging itself under the same class as the foregoing, but as wanting that species of fear of injury to the reputation which is necessary to constitute a robbery: The prosecutrix, a servant maid, was inveigled into a mock-auction, and the door was shut. There were about twenty persons present. Refusing to bid, she was told, "You must bid before you obtain your liberty again." She, however, again refused and at length, alarmed by their importunities, she attempted to leave the shop. Being prevented, and conceiving that she could not gain her liberty without complying, she did bid, and the lot was knocked down to her. She again attempted to go; but the prisoner, who acted as master of the place, stopped her, and told her, if she had not the money, she must pay half a guinea in part, and leave a bundle she had with her. The prisoner, finding she could not comply, said, "Then you shall go to Bow-street, and from thence to Newgate, and be there imprisoned until you can raise the money." And he ordered the door to be guarded, and a constable to be sent for. A pretended constable coming in, the prisoner who had kept his hand on the girl's shoulder, said, "Take her, constable, take her to Bow-street, and thence to Newgate." The pretended constable said, "Unless you give me a shilling, you must go with me." During this conversation, the prisoner again laid one hand on the girl's shoulder, and the other on her

bundle, and while he thus held her, she put her hand into her pocket, took out a shilling, and gave it to the pretended constable, who said, "If Knewland (the prisoner) has a mind to release you, it is well; for I have nothing more to do with you:" and she was then suffered to make her escape. She stated upon oath that she was in bodily fear of going to prison, and that under that fear she parted with the shilling to the constable, as a means of obtaining her liberty; but that she was not impressed by any fear, by the prisoner Knewland laying hold of her shoulder with one hand, and her bundle with the other; for that she had only parted with her money to avoid being carried to Bow-street, and thence to Newgate, and not out of fear or apprehension of any other personal force or violence. Upon a case reserved, the judges were of opinion, that the circumstances of this case did not amount to robbery. After adverting to the cases of threats to accuse persons of unnatural offences, Mr. Justice Ashurst, delivering the resolution of the judges, thus proceeds: "In the present case the threat which the prisoners made was to take the prosecutor to Bow-street, and from thence to Newgate; a species of threat which, in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery; for it was only a threat to put her into the hands of the law, and an innocent person need not in such circumstances be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection, and set her free. The terror arising from such a source cannot, therefore, be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress, for which the party injured may have a civil remedy by action, which could not be, if the fact amounted to felony. As to the circumstances affecting the other prisoner (Wood, the pretended constable), it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale-room, and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it. The judges, therefore, were all of opinion, that however the prisoners might have been guilty of a *conspiracy* or other misdemeanor, they could not in any way be considered guilty of the crime of robbery." *Knewland's case*, 2 *Leach*, 721; 2 *East*, *P. C.* 732.

Although this decision, so far as the question of putting in fear is concerned, may, perhaps, be regarded as rightly decided upon the express declaration of the prosecutrix herself, that she parted with the money merely to avoid being carried to Bow-street, and thence to Newgate, yet there are some portions of the opinion of the judges which appear to be at variance with the rules of law respecting robbery. The statement that *terror*, no less than *force*, is a component part of the complex idea annexed to the term robbery, is not in conformity with the various decisions already cited, from which it appears that either violence *or* putting in fear is sufficient to constitute a robbery. There seems also to be a fallacy in the reasoning of the court, with regard to threats of imprisonment held out to the prosecutrix. The impression made by such threats upon any person of common experience and knowledge of the world (and such the prosecutrix must be taken to have been) would be, not that the prisoner had *in fact* any intention of carrying the injured party before a magistrate, or of affording any such opportunity of redress, but that other artifices (as in the instance of the pretended constable) would

probably be resorted to, in order to extort money. It is difficult to imagine any case in which a party might with more reason apprehend violence and injury, both to the person and to the property, than that in which the prosecutrix was placed, and it is still more difficult to say, that there was not such *violence* resorted to, as independently of the question of putting in fear, rendered the act of the prisoners (supposing it to have been done *animo furandi*, of which there could be little doubt) an act of robbery. In *Gascoigne's case*, 1 *Leach*, 280; 2 *East*, *P. C.* 709, *ante*, p. 885. the prisoner not only threatened to carry the prosecutrix to prison, but actually did carry her thither, whence she was in due course discharged, and yet the nature of the threat did not prevent the offence from being considered a robbery. In that case, indeed, some greater degree of personal violence was used, and the money was taken from the prosecutrix's pocket by the prisoner himself; but it is clearly immaterial whether the offender takes the money with his own hand, or whether the party injured delivers it to him, in consequence of his menaces.

Proof of the putting in fear—must be before the taking.] It must appear that the property was taken while the party was under the influence of the fear; for if the property be taken first, and the menaces or threats inducing the fear, be used afterwards, it is not robbery. The prisoner desired the prosecutor to open a gate for him. While he was so doing, the prisoner took his purse. The prosecutor seeing it in the prisoner's hands, demanded it, when the prisoner answered, "Villain, if thou speakest of this purse, I will pluck thy house over thy ears," &c., and then went away; and because he did not take it with violence, or put the prosecutor in fear, it was ruled to be larceny only, and no robbery, for the words of menace were used after the taking of the purse. *Harman's case*, 1 *Hale*, *P. C.* 534; 1 *Leach*, 198 (*n*).

ROBBERY.

ASSAULT WITH INTENT TO ROB.

Statute 7 Wm. 4 & 1 Vict. c. 87, s. 6.] BEFORE the 7 & 8 Geo. 4, c. 29, s. 6, the offence of assaulting with intent to rob was provided against by the 4 Geo. 4, c. 54, s. 5 (repealing the 7 Geo. 2, c. 21). The 4 Geo. 4, enacted, that if any person should *maliciously* assault any other person, with intent to rob *such other* person, he should be adjudged guilty of felony, &c. The enactment in the 7 & 8 Geo. 4, was substantially the same, being "shall assault any other person with intent to rob him."

Now, by the 7 Wm. 4 & 1 Vict. c. 87, (E. and I.) the 7 & 8 Geo. 4, c. 29, s. 6, is repealed, and it is enacted, s. 6, that "whosoever shall assault any person with intent to rob, shall be guilty of felony, and being convicted thereof, shall (save and except in the cases where a greater punishment is provided by this act, see *ante*, p. 878,) be liable to be imprisoned for any term not exceeding three years."

Upon an indictment for an assault with intent to rob, the prosecutor must prove, 1, the assault; and 2, the intent of the prisoner to commit a robbery.

Proof of the assault.] The assault will be proved in the same manner as the assault in robbery, only that the completion of the offence, in taking the prosecutor's property from his person or in his presence, will be wanting. A question has been raised upon the repealed statutes, whether or not there must be an actual assault upon the same person whom it is the offender's intention to rob. In the construction of the 7 Geo. 2, c. 21, it was decided, that the assault must be upon the person intended to be robbed. The prosecutor was riding in a post-chaise when it was stopped by the prisoner, who, extending his arm towards the post-boy, presented a pistol, swore many bitter oaths with great violence, but did not make any demand of money. He immediately stopped the chaise, when the prisoner turned towards it; but perceiving some one coming up, rode off without speaking. Upon an indictment for assaulting the prosecutor with intent to rob him, Ashurst, J., told the jury, that the evidence was not sufficient; that the charge was, not for an assault with intent to rob the postilion, but with an intent to rob the prosecutor in the chaise, and that no such intent appeared. *Thomas's case*, 1 *Leach*, 330; 1 *East, P. C.* 417.

Proof of the intent to rob.] The intent to rob will be gathered from the general conduct of the prisoner at the time. Menaces, threats, violence, and in short whatever conduct which, if it had been followed by a taking of property, would have constituted robbery, will in this case be evidence of an intent to rob. The prisoners rushed out of the hedge upon the prosecutor, who was the driver of a return chaise, as he was passing along the road, and one of them, presenting a pistol, bade him stop, which the boy did, but called out for assistance to some persons whom he had met just before. On this one of the prisoners threatened to blow his brains out if he called out any more, which the prosecutor nevertheless continued to do, and, obtaining assistance, took the men, who had made no demand of money. They were convicted of an assault with intent to rob, and transported. *Trusty's case*, 1 *East*, *P. C.* 418.

It appears from one case to have been thought that, in order to substantiate the fact of the intent to rob, a demand of property was necessary to be proved. *Parfait's case*, 1 *East*, *P. C.* 416. It seems, however, that this decision was founded upon an erroneous view of the then statute, two of the clauses, that respecting assaults to rob, and that respecting demanding money by threats and menaces, being read as one enactment. 1 *East*, *P. C.* 417; *Thomas's case*, *Id.*, and *Trusty's case*, *Id.* 418, also tend to show that the resolution of the court in *Parfait's case* is erroneous; see also *Sharwin's case*, 1 *East*, *P. C.* 421. The words of the 7 & 8 Geo. 4, c. 20, s. 6, seem to have left no doubt upon the question, the words "with intent to rob" following immediately after the description of the offence by assaulting, and not being deferred, as in the 7 Geo. 2, c. 21, until after the description of the offence of demanding with menaces; and by the recent statute the two offences are kept distinct, being contained in separate clauses of the act. See *R.* v. *Huxley*, *Carr & M.* 596.

A person may be indicted in one count for feloniously assaulting the prosecutor with intent to steal his moneys and goods, and in another count for the misdemeanor of attempting to steal the same moneys and goods. *Ferguson's case*, 1 *Dears. C. C. R.* 427; *S. C.* 24 *L. J. M. C.* 61.

As to the attempt to extort money by menace, see *post*, *tit. Threats.*

SACRILEGE.

Statute 7 & 8 Geo. 4, c. 29.] The st. 23 Hen. 8, c. 1, and 1 Ed. 6, c. 12, which related to the offence of sacrilege, or breaking and stealing in a church, were repealed by the 7 & 8 Geo. 4, c. 27.

By 7 & 8 Geo. 4, c. 29, s. 10, "if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, [shall suffer death as a felon.]"

The Irish statute the 9 Geo. 4, c. 55, s. 10, is nearly the same, but omits the word chapel.

Now, by the 5 & 6 Wm. 4, c. 81 (E. and I.), so much of the above sections as inflicted the punishment of death, is repealed, and every person convicted of any of the offences therein specified, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Upon a prosecution under the 7 & 8 Geo. 4, c. 29, s. 10, the prosecutor must prove, 1, the breaking and entering; 2, that the building broken was a church or chapel within the statute; and 3, the stealing of goods in the church or chapel.

Such a breaking and entering as would constitute a burglary (see *ante*, pp. 328, 333), will be a breaking and entering within this statute; but it need not be in the night-time. It should be observed, that a breaking and entering, merely *with intent to steal*, is not made an offence by the statute.

Should the proof fail as to breaking and entering, the prisoner may be convicted of simple larceny. See *Nixon's case, post*, p. 901.

Proof that the building is a church or chapel.] It must appear that the building in which the offence was committed, was a church or chapel. Where the goods stolen had been deposited in the church-tower, which had a separate roof, but no outer door, the only way of going to it being through the body of the church, from which the tower was not separated by a door or partition of any kind; Park, J., was of opinion, that this tower was to be taken as a part of the church. *Wheeler's case*, 3 *C. & P.* 585.

This statute does not include the chapels of dissenters, *Richardson's case*, 6 *C. & P.* 335; and the practice is to indict, in such instances,

for the larceny. *Hutchinson's case, Russ. & Ry.* 412. So Patteson, J., held, that a Wesleyan chapel is not within the statute; but one of the prisoners was convicted of a simple larceny. *Nixon's case,* 7 *C. & P.* 442.

Where such chapels are intended to be comprised, they are specifically described, as in the 7 Wm. 4 & 1 Vict. c. 89, s. 3; see *ante,* p. 266.

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church-porch; but had a door opening into the churchyard, which could only be unlocked from the inside. It was held by Coleridge J., that this vestry was part of the fabric of the church, and within the act. *Evans's case, Carr. & M.* 298.

Proof of the stealing of goods.] The words in the 7 & 8 Geo. 4, c. 29, s. 10, "any chattels," must be held, like the words, "any goods," in the repealed statute, 1 Ed. 6, c. 12, to extend to articles deposited in a church, though not used for divine service. While a church was undergoing repair, the prisoner stole from it a pot used to hold charcoal for airing the vaults, and a snatchblock used to raise weights if the bells wanted repair. Upon a conviction for this offence as sacrilege, under the statute of Ed. 6, the judges were of opinion, that these goods were within the protection of the act, which was intended to prevent the violation of the sanctity of the place. *Rourke's case, Russ. & Ry.* 386. Upon the ground of the decision in the above case, and the very general nature of the words used in the new statute, it would probably be held, that the stealing of *any chattels* in the church, though deposited there by a private individual, would be larceny. See 2 *Deac. Dig. C. L.* 1156.

The allegation of property in the parishioners, rector, or churchwardens, will be sufficiently proved by evidence that the church is a parish church.

In *Wortley's case,* 1 *Den. C. C. R.* 162, the prisoner was indicted for breaking into a church and stealing a box and money. The box was a very ancient box, firmly fixed by two screws at the back to the outside of a pew in the centre aisle of the church, and by a third screw at the bottom, to a supporter beneath, and over the box was an ancient board, with the inscription painted thereon, "Remember the poor." The court "thought that the box might be presumed, in the absence of any contrary evidence, to have been placed in the church pursuant to the canon. *Burn's Eccl. Law,* 369, *tit. Church,* and that the money therein placed was constructively in the possession of the vicar and churchwardens."

SHOP.

BREAKING AND ENTERING A SHOP, AND STEALING THEREIN.

By the 7 & 8 Geo. 4, c. 29, s. 15 (the 9 Geo. 4, c. 55, I.), "if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned." By the section referred to (s. 14), the punishment was transportation for life, &c.

Now, by the 7 Wm. 4 & 1 Vict. c. 90 (E. and I.), s. 2, so much of the above section as relates to the punishment of persons convicted of the offences therein mentioned, is repealed, and persons convicted of such offences are liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years.

S. 3, authorises the court, in cases of imprisonment, to award hard labour and solitary confinement.

The prosecutor must prove a breaking and entering, in the same manner as upon an indictment for breaking and entering a dwelling-house, *ante*, p. 411; and he must then prove a larceny in the shop, and that the goods were the property of the person mentioned in the indictment. Probably the decisions with regard to the goods being under the protection of the dwelling-house (in prosecutions for breaking and entering a dwelling-house, and stealing therefrom, *ante*, p. 414), would be held applicable to prosecutions for this offence.

An indictment under the 7 & 8 Geo. 4, c. 29, s. 15, for stealing in a shop, &c., must allege that the prisoner stole the goods *therein;* an averment that the goods were in the shop and that the prisoner stole them, is not enough. *Per Patteson, J., Roger Smith's case,* 2 *Moo. & Rob.* 115.

But where an indictment for housebreaking averred, that the prisoner "forty-two pieces of the current gold coin, &c. in the same dwelling-house then and there being found, then and there feloniously did steal," &c.; Coleridge, J., held it sufficient, without the words "in the same dwelling-house," in the last allegation. The learned judge, on *Roger Smith's case* being cited, said, that Mr. Justice Patteson now doubted the correctness of that decision. *R.* v. *Andrews, Carr. & M.* 121.

A workshop, such as a carpenter's shop or a blacksmith's shop, is not within the 7 & 8 Geo. 4, c. 29, s. 15; to come within its provisions the shop must be for the sale of articles. *Per Alderson, B., R.* v. *Sanders,* 9 *Carr. & P.* 79. But it has recently been held by Lord Denman, C. J., in *R.* v. *Carter,* 1 *C. & K.* 173, that a person who breaks into an ordinary blacksmith's shop containing a forge and used as a workshop only, not being inhabited, nor attached to any dwelling-house, and who steals goods therein, may be convicted

of breaking into a shop and stealing goods, under the foregoing section. A building formed part of premises employed as chemical works; it was commonly called "The Machine House," a weighing-machine being there, where all the goods sent out were weighed, and a book being kept there, in which entries of the goods so weighed were made. It appeared that the account of the time of the workmen employed in the works, was kept in this place; that the wages of the men were paid there; that the books in which the entries of time and the payment of wages were entered, were brought to the building for the purpose of making entries and paying wages, but that at other times they were kept in what was called "the office," where the general books and accounts of the concern were kept. It was held, that this building was a counting-house within this section. *Potter's case*, 2 *Den. C. C. R.* 235; *S. C.* 20 *L. J. M. C.* 170. A cellar used merely for the deposit of goods intended for removal and sale is a warehouse within this section. *Per Rolfe, B.*, in *Hill's case*, 2 *Moo. & R.* 458.

SMUGGLING.

AND OTHER OFFENCES CONNECTED WITH THE CUSTOMS.

The statutes against the offence of smuggling were included in the 6 Geo. 4, c. 108; but other statutes having been subsequently passed, the whole were consolidated in the 3 & 4 Wm. 4, c. 53. This latter statute, and the parts of acts subsequently passed for the amendment of the law, are now consolidated in the 8 & 9 Vict. c. 87 (U. K.), which contains various regulations with regard to prosecutions by the customs in general.

Proof of assembling armed to assist in smuggling.] By the 8 & 9 Vict. c. 87, s. 63, "if any persons to the number of three or more, armed with fire-arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs or other officer authorised to seize the same, or from any person or persons employed by them, or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing of the apprehension of any person who shall have been guilty of such offence, or in case any persons to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of the natural life of such

offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

On the part of the prosecution, the evidence will be—1, that the defendants to the number of three or more, were assembled together; 2. for the purpose of aiding and assisting; 3, that they, or some of them (see *Smith's case, Russ. & Ry.* 386, *ante* p. 540), were armed; 4, with offensive weapons.

Proof of being assembled together.] It must be proved that the prisoners, to the number of three or more, were assembled together, and as it seems, deliberately, for the purpose of aiding and assisting in the commission of the illegal act. Where a number of drunken men came from an alehouse, and hastily set themselves to carry away some Geneva which had been seized, it was considered very doubtful whether the case came within the statute 19 Geo. 2, c. 34, the words of which manifestly allude to the circumstance of great multitudes of people coming down upon the beach of the sea, for the purpose of escorting uncustomed goods. *Hutchinson's case*, 1 *Leach*, 343.

Reasonable proof must be given from which the jury may infer that the goods were uncustomed. See *Shelley's case*, 1 *Leach*, 340 (*n*).

Proof of being armed with offensive weapons.] Although it may be difficult to define what is to be called an offensive weapon; yet it would be going too far to say, that nothing but guns, pistols, daggers, and instruments of war are to be so considered; bludgeons, properly so called, and clubs, and any thing not in common use for any other purpose than a weapon, being clearly offensive weapons within the meaning of the act. *Cosan's case*, 1 *Leach* 342, 343 (*n*). Large sticks, in one case, were held not to be offensive weapons; the preamble of the statute showing that they must be what the law calls dangerous. *Ince's case*, 1 *Leach*, 342 (*n*). But on an indictment with intent to rob, a common walking-stick has been held to be an offensive weapon. *Johnson's case*, *Russ. & Ry.* 492, and *Fry's case*, 2 *Moo. & R.* 42, *ante*, p. 541. See also *Sharwin's case*, 1 *East*, *P. C.* 321. A whip was held not to be "an offensive weapon," within the 9 Geo. 2 c. 35, *Fletcher's case*, 1 *Leach*, 23; and, under the 6 Geo. 4, c. 138, *bats* which are poles used by smugglers to carry tubs, were held not to be offensive weapons. *Noake's case*, 5 *C. & P.* 326. If in a sudden affray, a man snatch up a hatchet, this does not come within the statute. *Rose's case*, 1 *Leach* (*n*).

Proof of shooting at a vessel belonging to the navy, &c.] By s. 64 of the 8 & 9 Vict. c. 87, "if any person shall maliciously shoot at any vessel or boat belonging to her majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines being duly employed for the prevention of smuggling and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty (see sections 131 and 132 *post*, p. 907), every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas for the term of the

natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Upon an indictment under the first part of this section, the prosecutor must prove—1, the shooting; 2, the malice; 3, that the vessel shot at was belonging to the navy, or in the service of the revenue; 4, that the vessel was within 100 leagues of the coast.

Upon the statute 52 Geo. 3, c. 143, it was held, that if a customhouse vessel chased a smuggler, and fired into her without hoisting such a pendant and ensign as the statute 56 Geo. 3, st. 2, c. 104, s. 8, required, the returning of the fire by the smuggler was not malicious within the act. *Reynold's case, Russ. & Ry.* 465.

Proof of being in company with others having prohibited goods.] By the 8 & 9 Vict. c. 87, s. 65, "if any person, being in company with more than four other persons, be found with any goods liable to forfeiture under this or any other act relating to the customs or excise, or in company with one other person, within five miles of the sea coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every such person shall be judged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the term of seven years."

As to assaults on officers employed to prevent smuggling, see the 8 & 9 Vict. c. 87, s. 66, which is *verbatim* the same as the 3 & 4 Wm. 4, c. 53, s. 61, *ante*, p. 287.

Service of indictment in certain cases, and entering plea for prisoner.] By the 8 & 3 Vict. c. 87, s. 122, the judges of the Queen's Bench are empowered to issue warrants for apprehending offenders prosecuted by indictment or information, and such offenders neglecting to give bail, may be committed to gaol; and where any person, either by virtue of such warrant of committment, or by virtue of any writ of *capias ad respondendum* issued out of the said court, is now detained, or shall hereafter be committed to and detained in any gaol for want of bail, it shall be lawful for the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol wherein such person is or shall be so detained, with a notice thereon indorsed, that unless such person shall, within eight days from the time of such delivery of a copy of the indictment or information as aforesaid, cause an appearance and also a plea or demurrer to be entered in the said court to such indictment or information, an appearance and plea of not guilty will be entered thereto in the name of such person; and in case he or she shall thereupon, for the space of eight days after the delivery of a copy of such indictment or information as aforesaid, neglect to cause an appearance and also a plea or demurrer to be entered in the said court to such indictment or information, it shall be lawful for the prosecutor of such indictment or information, upon affidavit being made and filed in the court of the delivery of a copy of such indictment or information, with such notice indorsed thereon as aforesaid, to such person, or to such gaoler, keeper, turnkey as the case may be, which affidavit may be made before any judge or commissioner of the said court, authorised to take affidavits in the said court, to cause an appearance and the plea of not guilty to be entered in the said court to such indictment on information, for such person; and such proceedings shall be had thereupon as if the defendant in such indictment or information appeared

and pleaded not guilty, according to the usual course of the said court; and that if upon trial of such indictment or information any defendant so committed and detained as aforesaid shall be acquitted of all the offences therein charged upon him or her, it shall be lawful for the judge before whom such trial shall be had, although he may not be one of the judges of the said Court of Queen's Bench, to order that such defendant shall be forthwith discharged out of custody as to his or her commitment as aforesaid, and such defendant shall be thereupon discharged accordingly.

Presumptions on proceedings under the 8 & 9 *Vict. c.* 87.] This statute creates various presumptions for the purpose of facilitating the evidence in proceedings instituted under it.

By s. 130, "in case of any information or proceedings had under this or any other act relating to the customs, the averment that the commissioners of her Majesty's customs or excise have directed or elected such information or proceedings to be instituted, or that any vessel is foreign, or belonging wholly or in part to her Majesty's subjects, or that any person detained or found on board any vessel or boat liable to seizure is or is not a subject of her Majesty, or that any person is an officer of the customs; and where the offence is committed in any port in the United Kingdom, the naming of such port in any information or proceedings, shall be sufficient, without proof as to such fact or facts, unless the defendant in such case shall prove to the contrary."

By s. 131, "all persons employed for the prevention of smuggling under the direction of the commissioners of her Majesty's customs, or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment, in any information or suit, that such party was so duly employed, shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary."

And by s. 132, "if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines being duly employed for the prevention of smuggling and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information."

And see s. 133, as to what shall be deemed sufficient evidence of an order of the Treasury, or of the commissioners of customs or excise.

Limitation of prosecution.] By the 8 & 9 Vict. c. 87, s. 134, "all suits, indictments, or informations exhibited for any offence against this or any other act relating to the customs in any of her Majesty's courts of record at Westminster, or in Dublin, or in Edinburgh, or in the royal courts of Guernsey, Jersey, Alderney, Sark, or Man, shall and may be had, brought, sued, or exhibited within three years next after the date of the offence committed, and shall and may be exhi-

bited before any one or more justices of the peace within six months next after the date of the offence committed."

All indictments under this act (except cases before justices) are to be preferred by order of the commissioners. Sect. 126.

Venue.] By the 8 & 9 Vict. c. 87, s. 95, "in case any offence shall be committed upon the high seas against this or any other act relating to the customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred at the place on land in the United Kingdom or the Isle of Man, into which the person committing such offence, or incurring such penalty or forfeiture, shall be taken, brought, or carried, or in which such person shall be found; and in case such place on land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, borough, liberty, division, franchise, or town corporate, as any justice of the peace of the county within such city, borough, liberty, division, franchise, or town corporate, is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding: provided always, that where any offence shall be committed in any place upon the water, nor being within any county of the United Kingdom, or where any doubt exists as to the same being within any county, such offence shall, for the purposes of this act, be deemed and taken to be an offence committed upon the high seas."

By s. 136, "Any indictment or information for any offence against this act, or any act relating to the customs, shall and may be inquired of, examined, tried, and determined in any county of England, where the offence is committed in England, and in any county in Scotland, where the offence is committed in Scotland, and in any county in Ireland, where the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried."

SODOMY.

By the s. 9, Geo. 4, c. 31, s. 15 (the 10 Geo. 4, c. 34, I.), "every person convicted of the abominable crime of buggery committed either with mankind or with any animal, shall suffer death as a felon."

This sentence may be recorded.

The clause (sec. 18) respecting the difficulty of proof with regard to the completion of the offence of rape, already stated, *ante*, is applicable also to this crime; and the cases there cited, on the interpretation of that clause, are authorities here.

It is not necessary to prove that the offence was committed against the will of the party upon whom the assault is made; and if that party be consenting, both are guilty of the offence.

If it be committed on a boy under fourteen years of age, it is felony in the agent only. 1 *Hale*, 670; 3 *Inst.* 59. In *Allen's case*, 1 *Den. C. C. R.* 364, the prisoner induced a boy of twelve years of age to have carnal knowledge of his person, the prisoner having been the pathic in the crime; and the court were unanimously of opinion that the conviction was right.

In one case a majority of the judges were of opinion, that the commission of the crime with a woman was indictable. *Wiseman's case*, *Fortescue*, 91; and see *Jellyman's case*, 8 *C. & P.* 604, where Patteson, J., held that a married woman who consents to her husband committing an unnatural offence with her, is an accomplice in the felony, and as such that her evidence requires confirmation, though consent or non-consent is not material to the offence.

The act in a child's mouth does not constitute the offence. *Jacob's case*, *Russ. & Ry.* 331.

Proof that the prisoner was addicted to such practices is not admissible, *ante*, p. 79.

If the proof be insufficient to make out the offence of sodomy, the party may be convicted of the attempt to commit; see 14 & 15 Vict. c. 100, s. 9, *ante*, p. 96.

SPRING GUNS.

THE setting of spring guns and man traps is made a misdemeanor by the 7 & 8 Geo. 4, c. 18 (E. and I.); by the first section of which it is enacted and declared, that "if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor."

By s. 3, it is enacted and declared, that "if any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid."

But by s. 4, it is provided and enacted, that "nothing in this act shall be deemed or construed to make it a misdemeanor within the meaning of this act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set, or caused or continued to be set in a dwelling-house for the protection thereof."

And by s. 2, it is also provided and enacted, that "nothing herein contained shall extend to make it illegal to set any gin or trap, such as may have been or may be usually set with the intent of destroying vermin."

Upon a prosecution in this statute, the prosecutor must prove—1st, the setting, or causing to be set, the engine in question; and, 2, the intent to destroy or inflict grievous bodily harm. It is not, however, necessary to show an actual intent, the words of the statute being, "or whereby the same may destroy or inflict," &c., therefore, if the party sets the engine in such a place as that in reasonable probability it may inflict the injury, the offence seems complete.

If the indictment is for continuing the engine, evidence must be given that the defendant knew of its being set, and knowingly continued it.

The setting of a dog spear is not prohibited by this statute, unless perhaps it be set with intent to do grievous bodily harm to human beings. *Jordin* v. *Crump*, 8 *M. & W.* 782.

THREATS.

DEMANDING MONEY WITH MENACES.

Statute 7 Wm. 4 & 1 Vict. c. 87, s. 7.] By the 7 Wm. 4 & 1 Vic. c. 87 (E. and I.), (by which are repealed so much of the 7 & 8 Geo. 4, c. 29 (E.); and 9 Geo. 4, c. 55 (I.), as relates to robbery, assault with intent to commit robbery, and demanding property with menaces or by force), it is enacted by s. 7, that "whosever shall with menaces or by force, demand any property (which words by sect. 12, is to denote every thing included under the words "chattel, money or valuable security," in the 7 & 8 Geo. 4, c. 29) of any person with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable to be imprisoned for any term not exceeding three years." And see 10 & 11 Vict. c. 66, *post*, p. 922.

Upon an indictment under this statute, the prosecutor must prove —1, the demand; 2, the menaces or force; 3, the intent to steal.

Proof of the demand.] There must be evidence that the prisoner demanded some chattel, money, or valuable security.; but it does not appear to be necessary that the demand should be made in words, if the conduct of the prisoner amount to a demand in fact. Where the prisoners seized the prosecutor, and one of them said, "Not a word, or I will blow your brains out," and the other repeated the words, and appeared to be searching for some offensive weapon in his pocket, when, upon the prosecutor seizing him, the other prisoner ran away without anything more being said; on an objection that this was no *demand* (within the reapealed statute 7 Geo. 2, c. 21, which enacts, that if any person shall, by menaces or by any forcible or violent manner, *demand* any money, &c., with intent, &c.), the court said, that *an actual demand* was not necessary, and that this was a fact for the jury, under all the circumstances of the case. The case was afterwards disposed of, on the form of the indictment. *Jackson's case*, 1 *Leach*, 267; 1 *East, P. C.* 419; see 5 *T. R.* 169.

In another case upon the same statute, but upon an indictment for an assault with intent to rob, Willes, C. J., made the following observations on the subject of a demand: The circumstances were that the prisoner did not make any demand, or offer to demand the prosecutor's money; but only held a pistol in his hand towards the

prosecutor, who was a coachman on his box; and, *per* Willes, C. J., a man who is dumb may make a demand of money, as if he stop a person on the highway, and put his hand or hat into the carriage, or the like; but in this case the prisoner only held a pistol to the coachman, and said to him nothing but "Stop." That was no such demand of money as the act requires. *Parfait's case*, 1 *East, P. C.* 416. Upon this Mr. East justly remarks, that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand to go to a jury. The unfortunate sufferer understands the language but too well; and why must courts of justice be supposed ignorant of that which common experience teaches to all men? 1 *East, P. C.* 417; 1 *Russ. by Grea.* 767.

Where an indictment stated that the prisoner "feloniously, by menaces did demand the moneys of the said J. K." it was held insufficient, because it did not state from whom he had demanded them. *Dunkley's case*, 1 *Moo. C. C.* 90.

Proof of the threat or force.] The prosecutor must show that the demand was made with menaces, or by force. With regard to the menaces they must be of the same nature, as, if the money had been delivered in consequence of them, would have constituted the offence of robbery. *Vide supra.* In the same manner the *force* used must be such as would have been sufficient to render *the taking* a robbery.

Proof of the intent.] The intent, as in similar cases, will be proved from the circumstances under which the demand was made. The decisions upon the *animus furandi* in robbery (*vide ante*, p. 880), may be referred to as governing the evidence in this case also.

Proof with regard to the thing demanded.] In order to bring the offence within the statute, the thing demanded must be such as the party menaced has the power of delivering up, or is supposed by the offender to have the power of delivering up. Where several persons were indicted for demanding with menaces the money of W. Gee, with intent to steal it, and it appeared that they had by duress extorted from him a cheque (which he wrote on a paper furnished by the prisoners), upon a banker, for a large sum of money, the offence was held not to be within the statute. *Edwards's case, O. B.* 6 *C. & P.* 515. The prisoners were afterwards charged with demanding by menaces a valuable security for money, but the court held this offence likewise not within the statute, on the ground that the check never was in the peaceable possession of Mr. Gee. *Edwards's case. Id.* 521.

Where the prisoner in one count of the indictment was charged under the 7 Wm. 4 & 1 Vict. c. 87, s. 7, with demanding the moneys of the prosecutor with intent to steal the same, and it appeared that he had actually obtained money from the prosecutor; Law, recorder, said he should hold that, if menaces were used to obtain money, that count was sustained, although the money was actually obtained. The prisoner was found guilty upon the above count, but was subsequently sentenced upon another count in the same indictment. *Norton's case*, 8 *C. & P.* 671; see *ante*, p. 894.

THREATENING LETTERS—DEMANDING MONEY.

Statute 7 & 8 Geo. 4, c. 29.] The offence of demanding money by a threatening letter was provided against by the statute 9 Geo. 1, c. 22, s. 1, which enacted, that if any person or persons should knowingly send any letter without any name subscribed, or with a fictitious name, demanding money, venison, or other valuable thing, he should be guilty of felony without benefit of clergy. This enactment was extended by 27 Geo. 2, c. 15, to threats to kill, or murder, or to burn houses, &c., and by 30 Geo. 2, c. 24, to threats to accuse of any crime punishable with death, transportation, pillory, or other infamous punishments. There were several important differences in the defining of the different offences created by these statutes, which it is not now necessary to specify. See 1 *Russ. by Grea.* 711. These statutes were repealed by the 4 Geo. 4, c. 54, s. 3, and their provisions re-enacted, and the latter statute is also repealed by the 7 & 8 Geo. 4, c. 27, except so far as relates to any person who shall send or deliver any letter or writing, threatening to kill or murder, or to burn, or destroy, as therein mentioned, or shall be accessary to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence.

By the 7 & 8 Geo. 4, c. 29 (the 9 Geo. 4, c. 55. I.), s. 8, it is enacted, that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, every such offender being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment.

For the remainder of the section, and for st. 10 & 11 Vict. c. 66, see *post* 922.

Upon a prosecution for knowingly sending or delivering any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, the prosecutor must prove, 1, the knowingly sending or delivering of the letter by the prisoner; 2, the nature of the letter or writing, and that it contains a demand, with menaces, and without any

reasonable or probable cause; and, 3, that the demand is of some chattel, money, or valuable security.

Proof of the sending or delivering of the letter or writing.] The sending or delivering of the letter need not be immediately by the prisoner to the prosecutor, if it be proved to be sent or delivered by his means and directions, it is sufficient. Upon an indictment on the repealed statute 27 Geo. 2, c. 15, for sending a threatening letter to William Kirby, it appeared that the threats were, in fact, directed against two persons named Rodwell and Brook. Kirby received the letter by the post. The judges held that as Kirby was not threatened, the judgment must be arrested, but they intimated that if Kirby had delivered the letter to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. *Paddle's case, Russ. & Ry.* 484. Where the prisoner dropped the letter upon the steps of the prosecutor's house, and ran away, Abbott, C. J., left it to the jury to say, whether they thought the prisoner carried the letter and dropped it, meaning that it should be conveyed to the prosecutor, and that he should be made acquainted with its contents, directing them to find him guilty if they were of opinion in the affirmative. *Wagstaff's case, Russ. & Ry.* 398. So in a case upon the 9 Geo. 1, c. 22, for sending a letter demanding money; Yates, J., observed, that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance by which it might finally come to his hands. The fact was, that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning before the service began where the sexton picked it up, and delivered it to him. *Lloyd's case*, 2 *East, P. C.* 1122. In a note upon this case, Mr. East says *quære*, whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person who, it is expected, will forward it to such party, this may not be said to be a *sending* to such party? The same evidence was given in *Springett's case*, (2 *East, P. C.* 1115,) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was taken on that ground. 2 *East, P. C.* 1123, (*n*). So where the evidence was that the letter was in the handwriting of the prisoner, who had sent it to the post-office, whence it was delivered in the usual manner; no objection was made. *Heming's case*, 2 *East, P. C.* 1116. See *R.* v. *Grimwade* and *R.* v. *Williams*, *post*, p. 918.

It must appear that the prisoner sent or delivered the letter in question, knowing it to be such a letter as described in the statute. In a case upon the 27 Geo. 2, c. 15, the evidence was, that the prisoner delivered the letter at the gate of Newgate, to a person who was employed in doing errands for the prisoners; that this person immediately carried it to the penny post-office, whence it was regularly conveyed, as directed, to the prosecutor, but there was no proof of the prisoner's handwriting, or that he was acquainted with the contents. Hotham, B., left it to the jury to say whether, from the fact of the prisoner having delivered the letter as before mentioned, he knew of the contents, and the jury having found the prisoner guilty, the judges held the conviction right. *Girdwood's case*, 1 *Leach*, 142; 2 *East, S. C.* 1120.

Where there is no person in existence of the precise name which

the letter bears as its address, it is a question for the jury whether the party into whose hands it falls was really the one for whom it was intended. *Per Maule, J., R.* v. *Carruthers*, 1 *Cox, C. C.* 139.

Where the only evidence against the prisoner was a statement he had made, that he would never have *written* the letter but for W. G.; Lord Abinger, C. B., held it insufficient. *Howe's case*, 7 *C. & P.* 268.

Proof of the nature of the letter or writing.] It must be proved that the letter or writing was one demanding of some person with menaces, and without any reasonable or probable cause, some chattel, &c.

The act mentions letter or writing in general, and does not specify whether it shall or shall not have a signature, or a fictitious signature, or initials, and the questions, therefore, which arose upon the 9 Geo. 1, c. 22, respecting the mode of signature (see *Robinson's case*, 2 *Leach*, 749; 2 *East, P. C.* 1110) have become immaterial. Nor need the document have the form of a letter; any *writing* containing a threat of the nature mentioned in the statute, is within the section. And see 10 & 11 Vict. c. 66, *post*, 922.

Proof of the nature of the letter or writing—the demand.] The letter must contain a *demand* with menaces, and without any reasonable or probable cause. Whether the demand is such as is laid in the indictment is a question for the jury. *Girdwood's case*, 1 *Leach*, 142; 2 *East, P. C. C.* 1121. See also *R.* v. *Carruthers*, 1 *Cox, C. C.* 139. The demand need not be made in express words; it is sufficient if it appear from the whole tenor of the prisoner's letter. See the cases cited *infra*. That the demand was made with menaces, and without any reasonable or probable cause, will also appear in the same manner; but should any doubt exist upon the latter point, the prosecutor should be called to give some evidence of the want of reasonable and probable cause.

A mere request, such as asking charity, without imposing any conditions, does not come within the sense or meaning of the word "demand." *Robinson's case*, 2 *Leach*, 749; 2 *East, P. C.* 1110.

The prisoner was indicted for sending a letter to the prosecutor, demanding money, with menaces. The letter was as follows:—

"Sir, as you are a gentleman and highly respected by all who know you, I think it is my duty to inform you of a conspiracy. There is a few young men who have agreed to take from you personally a sum of money, or injure your property. I mean to say your building property. In the manner they have planned, this dreadful undertaking would be a most serious loss. They have agreed, &c. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. T.'s garden gate, I will leave a letter in the place to inform you when this is to take place. I hope you wont attempt to seize me, when I come to take up the money and leave the note of information. Sir, you will find I am doing you a most serious favour, &c., &c." Bolland, B., doubted whether this letter contained either a *menace* or a *demand*, and reserved the point for the opinion of the judges who held that the conviction was wrong. *Pickford's case*, 4 *C. & P.* 227.

The words "without any reasonable or probable cause" in the 7 & 8 Geo. 4, c. 29, s. 8, apply to the money demanded, and not to

the accusation threatened to be made. *R.* v. *Hamilton*, 1 *C. & K.* 212. It is for the jury to consider whether the demand was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing. *Per Tindal, C. J.*, *R.* v. *Miard*, 1 *Cox, C. C.* 22. In the same case it was also held by the learned chief justice, that the threat of exposing in his own church, on Easter Sunday, a clergyman, who had committed great vices; of publishing his conduct afterwards to every rank of society in his own neighbourhood; and also of spreading his disgrace more publicly still, could scarcely be said to be such a threat as not to require more than ordinary firmness to resist, and therefore according to the proper test laid down by Lord Ellenborough, in *R.* v. *Sotheron*, 6 *East*, 126, falls within the meaning of the act.

The rule that a threat is not of a criminal character, unless it be such as may overcome the ordinary free will of a firm man, has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed. The court of Criminal Appeal, therefore, held that a letter sent to the prosecutor, stating that the writer knew that persons with whom he was in some way connected intended to burn the prosecutor's premises, and that the writer could avert the catastrophe if the prosecutor would give him a sum of money, but not otherwise, was a threatening letter within the statute. *Thomas Smith's case*, 1 *Den. C. C. R.* 510; *S. C.* 19 *L. J. M. C.* 80.

Proof of the thing demanded.] It must appear that the thing demanded by the letter or writing was a chattel, money, or some valuable security. Where the indictment charged, that the prisoner intending to extort *money*, sent a threatening letter; and it appeared that it was for the purpose of extorting a promissory note, it was held that the evidence did not support the indictment. *Major's case*, 2 *Leach*, 772; 2 *East*, *P. C.* 1118; and see *Edward's case*, 6 *C. & P.* 515, *ante*, p. 912.

THREATS.

ACCUSING OF MURDER, ETC.

Statute 4 *Geo.* 4, *c.* 54.] THAT portion of the statute 4 Geo. 4, c. 54, which relates to threats to kill or murder, or to burn or destroy, was excepted from the repealing statute of 7 & 8 Geo. 4, c. 27, *vide ante*.

By the 4 Geo. 4, c. 54, s. 3, if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of grain, hay or straw, see *post*, or shall procure, counsel, aid, or abet the commission of the said offences, or any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any of the said offences, every person so offending shall, upon being thereof lawfully convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years.

By the 1 & 2 Wm. 4, c. 44, (I.) s. 3, if any person or persons shall knowingly, print, write, post, publish, circulate, send, or deliver, or cause or procure to be printed, &c., any notice, letter, or message, exciting, or tending to excite, any riot, tumultuous, or unlawful meeting or assembly, or unlawful combination or confederacy, or threatening any violence, injury, or damage upon any condition, or in any event or otherwise, to the person or property, real or personal, of any person whatever; or demanding any money, arms, weapons, or weapon, ammunition, or other matter or thing; or directing or requiring any person to do or not to do any act or to quit the service or employment of any person, or to set or give out any land, every person so offending shall be liable to be transported for seven years, or to be imprisoned with or without hard labour, for any term not exceeding four years, and if a male, to be once, twice, or thrice, publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment.

In a prosecution under the 4 Geo. 4, c. 54, s. 3, the prosecutor must prove, 1, the knowingly and wilfully sending or delivering a letter, or

writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature; and 2, that it was a letter threatening to kill or murder, &c. No view or intent to extort money is required by this act to constitute the offence.

In an indictment for sending a threatening letter the first count charged G. with sending to R., and threatening to burn R's. houses; and it was proved that R. had only a reversionary interest in the houses. The second charged G. with sending to R., and threatening to burn the said houses, laying them as the property of B., the tenant; it was proved that G. dropped the letter in a public road near R's. house, that A. found it, and gave it to H., who opened it, read it, and gave it to E., who showed it both of B. and R. The court held that this was a sending within the statute, and that the conviction on the second count was good; but the point in the first count was left undetermined. *Grimwade's case*, 1 *Den. C. C. R.* 30. But see now 10 & 11 *Vict. c.* 66, *s.* 1, *post*, p. 922.

Affixing a threatening letter on a gate in a public highway, near which the prosecutor would be likely to pass from his house, is some evidence to go to the jury of a sending of the letter to him. *Per Cresswell, J., R. v. Williams*, 1 *Cox, C. C.* 16.

Proof of the sending or delivering of the letter, &c.] The sending or delivering will be proved in the manner before mentioned, with regard to other threatening letters. *Vide ante*, p. 914.

The house, &c. of the party to whom the letter is sent, must be in his own possession, &c. Sending a letter to A., threatening to burn a house of which he is the owner, but which is let to and occupied by a tenant, is not within the act. *Per Maule, J., R. v. Burridge*, 2 *Moo. & R.* 296. See *Grimwade's case, supra.*

Proof that the letter was one threatening to kill or murder, &c.] Whether or not the letter amounts to a threat to kill or murder, &c., within the words of the statute, is a question for the jury. The prisoner was indicted (under the 27 Geo. 2, c. 15,) for sending a letter to the prosecutor, threatening to kill or murder him. The letter was as follows:—

"Sir—I am sorry to find a gentleman like you would be guilty of taking M'Allester's life away for the sake of two or three guineas, but it will not be forgot by one who is but just come home to revenge his cause. This you may depend upon; whenever I meet you I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from M'Allester, before he died, for to seek revenge, I am come to town.—I remain a true friend to M'Allester, "J. W."

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner, if they thought the words might import any thing less than to kill or murder. The jury having found the prisoner guilty, on a case reserved, the judges were of opinion that the conviction was right. *Girdwood's case*, 1 *Leach*, 142; 2 *East, P. C.* 1121.

The prisoners were indicted on the 27 Geo. 2, c. 15, for sending to the prosecutor the following letter:—

"Sir—I am very sorry to acquaint you, that we are determined to set your mill on fire, and likewise to do all the public injury we are able to do you, in all your farms and seteres [lettings] which you are

in possession of, without you on next —— day release that Ann Wood which you put in confinement. Sir, we mention in a few lines, and we hope if you have any regard for your wife and family, you will take our meaning without any thing further; and if you do not, we will persist as far as we possibly can; so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines, a fact, with our respect. So no more at this time from me. "R. R."

It was proved that this was in the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the prosecutor's yard, when it was taken by a servant, and delivered to the prosecutor. The prosecutor swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; that he held a farm when the letter was written and came to his hands, with several buildings upon it. On a case reserved, it was agreed by the judges, that as the prosecutor had no such property at the time, as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest Lord Kenyon, C. J., and Buller, J., were of opinion, that the letter must be understood as also importing a threat to burn the prosecutor's farmhouse and buildings, but the other judges, not thinking that a necessary construction, the conviction was held wrong, and a pardon recommended. *Jepson and Springett's case*, 2 *East, P. C.* 1115.

The prisoners were charged in one count with sending a letter to the prosecutor, threatening to kill and murder him, and a second count with threatening to burn and destroy his houses, stacks, &c. The writing was as follows: "Starve Gut Butcher, if you don't go on better great will be the consequence; what do you think you must alter an (or) must be set on fire; this came from London. i say your nose is as long rod gffg sharp as a flint 1835. You ought to pay your men." The jury negatived the threat to put the prosecutor to death, but found that the latter threatened to fire his houses, &c. Lord Denman, C. J., had some doubt whether the question ought to have been left to the jury, and whether the latter could be, in point of law, a threatening letter to the effect found. On the case being considered by the judges, they held the conviction good after verdict. *Tyler's case*, 1 *Moo. C. C.* 428.

THREATS.

ACCUSING OF INFAMOUS CRIMES, ETC.

THE offence of accusing, or threatening to accuse of unnatural crimes, whereby property has been extorted, has already been treated of under the title *Robbery*, see *ante*, p. 889. Under the present head the offence of accusing, as well of such crimes, as of the other crimes specified in the 7 & 8 Geo. 4, c. 29, s. 8, with a view to extort money, &c. will be considered.

Statute 7 & 8 *Geo.* 4, *c.* 29.] By the 7 & 8 Geo. 4, c. 29, s. 8 (the 9 Geo. 4, c. 55, I.), if any person shall accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse, any person of any crime punishable by law with death, transportation, or pillory, or with any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of felony; and being convicted thereof, shall be transported for life, &c.; see *ante*, p. 912.

Section 9, defines what shall be an infamous crime, *viz.*, buggery, committed either with mankind or beast, and every assault with intent to commit that crime, and every intent or endeavour to commit that crime, and every solicitation, persuasion, promise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit such crime.

On a prosecution upon this statute, the prosecutor must prove, 1, the accusing or threatening to accuse, or the knowingly sending or delivering of the letter or writing accusing or threatening to accuse; 2, that the accusation is of the nature specified in the statute; 3, the view or intent to extort or gain; 4, that the matter intended to be extorted or gained was some chattel, money, or valuable security.

Proof of the accusing or threatening to accuse, &c.] The accusation under this statute may either be by word of mouth or in writing, and an actual accusation before a competent authority or otherwise,

or a mere threat to make such an accusation, will be sufficient. But if the party has been already accused, threatening to procure witnesses to support that accusation, is not within the statute. "It is one thing to accuse, and another to procure witnesses to support a charge already made; this is at most a threat to support it by evidence." *Per Bayley, J., Gill's case, York Sum. Ass.* 1829, *Greenwood's Stat.* 191 (*n*), 1 *Lewin, C. C.* 305. An indictment upon the 4 Geo. 4, c. 54, s. 5 (which used the words "threaten to accuse"), charged the prisoners with "charging and accusing J. N., and with menacing and threatening to prosecute J. N." Upon an objection taken, that the indictment had not pursued the statute, Garrow, B. (after consulting Burrough, J.), was of that opinion. If, he said, the indictment had followed the statute, and it had been proved that the prisoners threatened to *prosecute* J. N., I should have left it to the jury to say whether that was not a threatening to accuse him. *Abgood's case*, 2 *C. & P.* 436.

It was held, that the threatening to accuse under the 7 & 8 Geo. 4, c. 29, s. 7 (now repealed, see *ante*), in which the same words "accuse or threaten to accuse," were used as in the 8th section, need not have been a threat to accuse before a judicial tribunal, a threat to charge before any third person being enough. *Robinson's case*, 2 *Moo. & R.* 14.

If the accusation or threat to accuse was contained in a letter or writing, the knowingly sending or delivering of such letter or writing must be proved in the manner already pointed out. *Vide ante*, p. 914.

Proof of the nature of the accusation.] It must be shown that the accusation, made or threatened, was of the nature of those specified in the statute. Where the meaning is ambiguous, it is for the jury to say whether it amounts to the accusation or threat imputed.

Declarations subsequently made by the prisoner are also admissible to explain the meaning of a threatening letter. The prisoner was indicted for sending a letter, threatening to accuse the prosecutor of an infamous crime. The prosecutor meeting the prisoner, asked him what he meant by sending him that letter, and what he meant by "*transactions five nights following*" (a passage in the letter). The prisoner said that the prosecutor knew what he meant. The prosecutor denied it, and the prisoner afterwards said, "I mean by taking indecent liberties with my person." This evidence having been received, and the point having been reserved for the opinion of the judges, they unanimously resolved that the evidence had been rightly received. *Tucker's case*, 1 *Moo. C. C.* 134. And see as to the necessity of particularising in the indictment the specific charge to which the accusation or threat refers, and as to the evidence necessary to support such indictment. *R.* v. *Middleditch*, 1 *Den. C. C. R.* 92.

Proof of the view or intent to extort money.] It must appear that the accusation or threat was made, or the letter or writing sent or delivered, with the view or intent to extort or gain from some person some chattel, &c. If the accusation or threat were merely made in passion, and with no view of gain, it would not be within the statute.

Proof of the thing intended to be extorted, &c.] The matter

intended to be gained or extorted must be some chattel, money, or valuable security, and it must be proved as laid in the indictment.

Statute 10 & 11 Vict. c. 66, s. 1.] The statute 10 & 11 Vict. c. 66, s. 1, extends the provisions of the statutes we have been considering, the 7 & 8 Geo. 4, c. 55 and 7 Wm. 4 & 1 Vict. c. 87, and enacts, "that if any person shall knowingly send or deliver, or utter to any other person, any letter or writing accusing, or threatening to accuse, either the person to whom such letter or writing shall be sent or delivered, or any other person, of any crime punishable by law with death or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any crime by the first mentioned act (7 & 8 Geo. 4, c. 55) defined to be an infamous crime, with a view or intent to extort or gain, by means of such threatening letter or writing, any property, money, security, or other valuable thing from any person whatever, or any letter or writing threatening to kill or murder any other person, or to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or shall knowingly procure, counsel, aid, or abet the commission of the said offences, or either of them, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or any term not less than seven years, or to be imprisoned with or without hard labour for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment."

TRANSPORTATION—RETURNING FROM.

By the 5 Geo. 4, c. 84, s. 22, "if any offender who shall have been, or shall be so sentenced or ordered to be transported or banished, or who shall have agreed, or shall agree, to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender, so being at large, being thereof lawfully convicted [shall suffer death as in cases of felony, without the benefit of clergy]; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing, or in attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff, or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of 20*l.*, for every such offender so convicted."

By s. 23, in any indictment against any offender for being found at large, contrary to that or any other act now or thereafter to be made, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, sentence, or any pardon or intention of mercy, or signification thereof, of or against or in any manner relating to such offender.

By s. 24, "the clerk of the court, or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation, or banishment (not taking for the same more

than 6s. 8*d.*) which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof."

Upon a prosecution for this offence, the prosecutor must prove, 1. the conviction of the offender, by producing a certificate according to the above section of the statute; 2. the sentence or order of transportation, in like manner. The signature and official character of the person signing the certificate must be proved. If the certificate is made by the clerk or officer of a court out of Great Britain, it is admissible when verified by the seal of the court or the signature of the judge. The "effect and substance" of the former conviction must be stated in the certificate; merely stating that the prisoner was convicted "of felony" is not sufficient. *Sutcliffe's case*, *Russ. & Ry.* 469 (*n.*); *Watson's case*, *Id.* 468. 3. proof must then be given of the prisoner's identity; and 4, that he was at large before the expiration of his term.

On the trial of an indictment against a person for being at large without lawful cause before the expiration of his term of transportation, a certificate of his former conviction and sentence was put in: it purported to be that of J. G., "deputy clerk of the peace" for the county of L., "and clerk of the courts of general quarter sessions of the peace holden in and for the said county, and having the custody of the records of the courts of general quarter sessions of the peace, holden in and for the said county." It was proved that Mr. H. was clerk of the peace of L., and that he had three deputy partners, of whom J. G. who had signed the certificate was one, and that each of them acted as clerk of the peace; and that for forty years they had kept the sessions' records at their office. Under these circumstances, Colman, J., held that the conviction and sentence were sufficiently proved. *Reg.* v. *Jones*, 2 *C. & K.* 524. In *Finney's case*, *Id.* 774, Alderson, B., held that the fact of the former sentence being in force at the time the prisoner was found at large, was sufficiently proved by the certificate of his conviction and sentence, the judgment not having been reversed, although on the face of such certificate it appeared that the sentence, viz. transportation for fourteen years, was one which could not have been inflicted on him, for the offence of which, according to the certificate, he had been convicted, viz., larceny.

Punishment.] By the 4 & 5 Wm. 4, c. 67, reciting the 22nd section of the 5 Geo. 4, c. 84, it is enacted, "that every person convicted of any offence above specified in the said act of the 5th year of the reign of his late Majesty king George 4, or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common gaol or house of correction, prison, or penitentiary, for any term not exceeding four years."

Reward to prosecutor.] The judge before whom a prisoner is tried

for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under the act. *R.* v. *Emmons*, 2 *Moo. & R.* 279.

The Irish statutes relative to the offence of returning from transportation are the 11 Geo. 3, c. 7, s. 2, and the 9 Geo. 4, c. 54, ss. 16, 17, 18, the punishment being modified, as in the above statute of the 4 & 5 Wm. 4, c. 67, by the 5 Vict. st. 2, c. 28, s. 12 (I.).

GENERAL MATTERS OF DEFENCE.

There are certain general matters of defence, the evidence with regard to which it will be convenient to comprise under the three following heads:—Infancy, Insanity, and Coercion by Husband.

INFANCY.

An infant is, in certain cases, and under a certain age, privileged from punishment, by reason of a presumed want of criminal design.

In cases of misdemeanors and offences not capital.] In certain misdemeanors an infant is privileged under the age of 21, as in cases of *nonfeasance* only, for laches shall not be imputed to him 1 *Hale, P. C.* 20,. But he is liable for misdemeanors accompanied with force and violence, as a riot or battery. *Id.* So for perjury. *Sid.* 253. So he may be convicted of a forcible entry, 4 *Bac. Ab.* 591: but must not be imprisoned. See *ante*, p. 471.

In cases of capital offences.] Under the age of seven years, an infant cannot be punished for a capital offence, not having a mind *doli capax*; 1 *Hale, P. C.* 19; nor for any other felony, for the same reason. *Id.* 27. But on attaining the age of fourteen, he is obnoxious to capital (and of course to any minor) punishment, for offences committed by him at any time after that age. 1 *Hale, P. C.* 25.

With regard to the responsibility of infants, between the ages of seven and fourteen, a good deal of doubt formerly prevailed, but it is now quite clear, that where the circumstances of the case show that the offender was capable of distinguishing between right and wrong, and that he acted with malice and an evil intention, he may be convicted even of a capital offence; and accordingly there are many cases, several of them very early ones, in which infants, under the

age of fourteen have been convicted and executed. Thus in 1629, an infant being eight and nine years of age was convicted of burning two barns in the town of Windsor, and it appearing that he had malice, revenge, craft, and cunning, he was executed. *Dean's case*, 1 *Hale*, *P. C.* 25 (*n*).

So Lord Hale mentions two instances to the same effect, one of a girl of thirteen, executed for killing her mistress, and another of a boy of ten, for the murder of his companion. 1 *Hale*, *P. C.* 26; *Fitz. Ab. Corone*, 118. In the year 1748, a boy of ten years of age was convicted of murder, and the judges, on a reference to them, were unanimously of opinion that the conviction was right. *York's case*, *Foster*, 70.

An infant under the age of fourteen years is presumed by law unable to commit a rape, and though in other felonies, *malitia supplet ætatem*, yet, as to this fact, the law presumes the want of ability, as well as the want of discretion. But he may be a principal in the second degree, as aiding and assisting, though under fourteen years, if it appears that he had a mischievous discretion. 1 *Hale*, *P. C.* 630; *Eldershaw's case*, 3 *C. & P.* 396; see further, *ante*, title *Rape*.

It is necessary, says Lord Hale, speaking of convictions of infants between the years of seven and twelve, that very strong and pregnant evidence should be given to convict one of that age. 1 *Hale*, *P. C.* 27; 4 *Bl. Com.* 23. And he recommends a respiting of judgment till the king's pleasure be known. *Ibid.*

See 10 & 11 Vict. c. 82; 13 & 14 Vict. c. 37, for the speedy and summary trial, conviction, and punishment of juvenile offenders.

Power is now most wisely and justly given to all courts of justice to send juvenile offenders convicted before them to reformatory schools; although, unfortunately, a child must still be subjected to at least a fortnight's imprisonment in gaol before he can be sent to the reformatory. The 17 & 18 Vict. c. 86, s. 2, enacts as follows:—"Whenever after the passing of this act any person under the age of sixteen years shall be convicted of any offence punishable by law, either upon an indictment or on summary conviction before a police magistrate, or before two or more justices of the peace, or before a sheriff or magistrate in Scotland, then and in every such case it shall be lawful for any court, judge, police magistrate of the metropolis, stipendiary magistrate, or any two or more justices of the peace, or in Scotland for any sheriff or magistrate of a borough, or police magistrate, before or by whom such offender shall be so convicted, in addition to the sentence then and there passed as a punishment for his offence, to direct such offender to be sent at the expiration of his sentence to some of the aforesaid reformatory schools, to be named in such direction, the directors or managers of which shall be ready to receive him, and to be there detained for a period not less than two years and not exceeding five years, and such offender shall be liable to be detained pursuant to such direction: provided always, that no offender shall be directed to be so sent and detained as aforesaid, unless the sentence passed as a punishment for his offence, at the expiration of which he is directed to be so sent and detained, shall be one of imprisonment for fourteen days at least: provided also that the secretary of state for the home department may at any time order any such offender to be discharged from any such school." This statute has been amended by 19 & 20 Vict. c. 87; sect. 1 of which enacts, that "it shall not be necessary at the time of passing sentence for any court," &c. "to name the particular school to which any youthful

offender is to be sent; but it shall be sufficient for such court, &c., to direct that such youthful offender be sent to such school, being a school duly certified, &c., and the directors and managers of which shall be willing to receive him as may thereafter, and before the expiration of the term of imprisonment to which he or she has been sentenced, be directed by the said court," &c.

INSANITY.

The defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been laid down by the judges, with regard to the nature and degree of aberration of mind which will excuse a person from punishment, are by no means consistent with each other, or as it should seem with correct principle. That principle appears to be well laid down in the following passage.

To amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, in *his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts. *Alison's Princ. Crim. Law. Scotl.* 645, 654.

The *onus* of proving the defence of insanity, or in the case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner. See *Alison's Princ. Crim. Law of Scotl.* 659; and for this purpose the opinion of a person possessing medical skill is admissible. *Wright's case, Russ. & Ry.* 456; *ante*, p. 170.

The disposal of persons found to be insane at the time of the offence committed, is regulated by the statute 39 and 40 Geo. 3, c. 94, *ante*, p. 216.

The mode of arraignment and trial of such persons have also been stated, *ante*, p. 216.

If the jury are of opinion that the prisoner did not in fact do all that the law requires to constitute the offence charged, supposing the prisoner had been sane, they must find him not guilty generally, and the court have no power to order his detention under the act, although the jury should find that he was in fact insane. Where therefore on an indictment for treason, which stated as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet at her Majesty, the jury found that the prisoner was insane at the time when he discharged the pistol; but whether the pistol was loaded with ball or not, there was no satisfactory evidence; the court

expressed a strong opinion that the case was not within the statute. Lord Denman, C. J., Patteson, J., and Alderson, B. *Oxford's case*, 9 *C. & P.* 525; 1 *Russ. by Grea.* 16 (*n*).

The above and a similar outrage led to the passing of the 5 & 6 Vict. c. 51, an act for the protection of the queen's person.

A man was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge, Mr. Justice Bosanquet, to suggest questions, to be put by the learned judge to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They however failed in showing that the defence was an incorrect one; on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity. *Pearce's case*, 9 *C. & P.* 667.

Cases in which the prisoner has been held not to be insane.] In the following cases, the defence of insanity was set up, but without effect, and the prisoners were convicted. The prisoner was indicted for shooting at Lord Onslow. It appeared that he was to a certain extent deranged, and had misconceived the conduct of Lord Onslow, but he had formed a regular design to shoot him, and prepared the means of effecting it. Tracy, J., observed, that the defence of insanity must be clearly made out; that it is not every idle or frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as to exempt him from punishment; but that where a man is totally deprived of understanding and memory, and does not know what he is doing any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. *Arnold's case*, *Collinson on Lunacy*, 475; 16 *How. St. Tr.* 764, 765. The doctrine of the learned judge in this case, may, perhaps, be thought to be carried too far; for if the prisoner, in committing the act, is deprived of the power of distinguishing between right and wrong with relation to that act, it does not appear to be necessary that he should not know what he is doing. *Vide, post.*

Lord Ferrers was tried before the house of lords for the murder of his steward. It was proved that he was occasionally insane, and fancied his steward to be in the interest of certain supposed enemies. The steward being in the parlour with him, he ordered him to go down on his knees, and shot him with a pistol, and then directed his servants to put him to bed. He afterwards sent for a surgeon, but declared he was not sorry, and that it was a premeditated act; and he would have dragged the steward out of bed, had he not confessed himself a villain. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. It was contended for the prosecution, that the complete possession of reason was not necessary in order to render a man answerable for his acts; it was sufficient if he could discriminate between good and evil. The peers unanimously found his lordship guilty. *Earl Ferrers' case*, 19 *How. St. Tr.* 886.

The prisoner was indicted for shooting at and wounding W. B., and the defence was insanity, arising from epilepsy. He had been attacked with a fit on the 9th July, 1811; and was brought home

apparently lifeless. A great alteration had been produced in his conduct, and it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, said that in insanity caused by epilepsy, the patient often imbibed violent antipathies against his dearest friends, for causes wholly imaginary, which no persuasion could remove, though rational on other topics. He had no doubt of the insanity of the prisoner. A commission of lunacy was produced, dated 17th June, 1812, with a finding that the prisoner had been insane from the 30th of March. [The date of the offence committed does not appear in the report.] Le Blanc, J., concluded his summing up, by observing, that it was for the jury to determine whether the prisoner, when he committed the offence with which he stood charged, was capable of distinguishing between right and wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act which he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. *Bowler's case, Collinson on Lunacy*, 673 (*n*).

The prisoner was indicted for adhering to the king's enemies. His defence was insanity. He had been accounted from a child a person of weak intellect, so that it surprised many that he had been accepted as a soldier. Considerable deliberation and reason, however, were displayed by him in entering the French service, and he stated to a comrade that it was much more agreeable to be at liberty, and have plenty of money, than to remain confined in a dungeon. The attorney-general in reply, said, that before the defence could have any weight in rebutting a charge so clearly made out, the jury must be satisfied that at the time the offence was committed, the prisoner did not really know right from wrong. He was convicted. *Parker's case, Collinson on Lunacy*, 477.

The direction of Mansfield, C. J., to the jury in *Bellingham's case*, seems not altogether in accordance with the correct rules on the subject of a prisoner's insanity. He said that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the act *he did not consider that murder was a crime against the laws of God and nature*, and that there was no other proof of insanity which would excuse murder or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be answerable to justice, and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such person be capable *in other respects*, of distinguishing between right and wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement. The prisoner

was found guilty and executed. *Bellingham's case*, 1 *Collinson on Lunacy*, 636; *Shelford on Lunacy*, 462; see *Offord's case*, 5 *C. & P.* 168. The above direction does not appear to make a sufficient allowance for the incapacity of judging between right and wrong *upon the very matter in question*, as in all cases of *monomania*. The following observations of an eminent writer on the criminal law of Scotland, are applicable to the subject. Although a prisoner understands perfectly the distinction between right and wrong, yet if he labours, as is generally the case, under an illusion and deception in his own particular case, and is thereby incapable of applying it correctly to his own conduct, he is in that state of mental aberration which renders him not criminally answerable for his actions. For example: a mad person may be perfectly aware that murder is a crime, and will admit that, if pressed on the subject; still he may conceive that a homicide he has committed was no wise blameable, because the deceased had engaged in a conspiracy, with others, against his own life, or was his mortal enemy, who had wounded him in his dearest interests, or was the devil incarnate, whom it was the duty of every good Christian to meet with weapons of carnal warfare. *Alison's Princ. Crim. Law Scotl.* 645, citing 1 *Hume*, 37, 38. And see the observations on *Bellingham's case*, *Alison*, 658. *Oxford's case, post*, p. 934.

It has been justly observed that the plea of insanity must be received with much more diffidence in cases proceeding from the desire of gain, as theft, swindling, or forgery, which generally require some art and skill for their completion, and argue a sense of the advantage of acquiring other people's property. On a charge of horse-stealing, it was alleged that the prisoner was insane, but as it appeared that he had stolen the horse in the night, conducted himself prudently in the adventure, and ridden straight by an unfrequented road to a distance, sold it, and taken a bill for the price, the defence was overruled. *Henderson's case*, *Alison's Princ. Crim. Law Scotl.* 655, 656.

Cases in which the prisoner has been held to be insane.] James Hadfield was tried in the Court of K. B. in the year 1800, on an indictment for high treason, in shooting at the King in Drury-lane theatre, and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793, received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God: sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 14th May preceding the commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and, alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed-post, and that God had ordered him to do so;

and, upon his wife screaming and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the King. He spoke very highly of the King, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the King entered: that at the moment when the audience rose on his Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; that when he fired, his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra, in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly and without any apparent derangement; and with equal calmness, repeated that he was tired of life, and said that his plan was to get rid of it by any means, that he did not intend any thing against the life of the king, for he knew the attempt only would answer his purpose.

The counsel for the prisoner put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for the jury to be satisfied that the act in question was the immediate unqualified offspring of the disease. Lord Kenyon, C. J., held, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet, there being no reason for believing the prisoner to have been at that period a rational and accountable being, he ought to be acquitted, and was acquitted accordingly. *Hadfield's case, Collinson on Lunacy,* 480; 1 *Russ. by Grea.* 13.

The prisoner was indicted for setting fire to the cathedral church of York. The defence was that he was insane. It was proved that he was much under the influence of dreams, and in court he gave an incoherent account of a dream that had induced him to commit the act, a voice commanding him to destroy the cathedral on account of the misconduct of the clergy. Several medical witnesses stated their opinions that he was insane, and that, when labouring under his delusion, he could not distinguish right from wrong. One surgeon said that such persons, though incapable on a particular subject of distinguishing right from wrong, seek to avoid the danger consequent upon their actions, and that they frequently run away and display great cunning in escaping punishment. The jury acquitted the

prisoner on the ground of insanity. *Martin's case, Shelford on Lunacy*, 465; *Annual Register*, vol. 71, pp. 71, 301.

In *R.* v. *Oxford*, Lord Denman, C. J., made the following observations to the jury: persons must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act and not be responsible. If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule. . . . On the part of the defence it is contended that the prisoner was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or in other words, that from the effect of a diseased mind, he did not know at the time that the act he did was wrong. . . . Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. 9 *C. & P.* 525.

Opinions of the judges on questions propounded by the house of lords.] In consequence of the acquittal on the ground of insanity of Daniel M'Naughten for shooting Mr. Drummond, the following questions of law were propounded by the house of lords to the judges. (See 8 *Scott's N. R.* 595; 1 *C. & K.* 130.)

"1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

"3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he hereby excused?

"5. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

Maule, J.—I feel great difficulty in answering the questions put by your lordships on this occasion:—First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to

every possible state of facts not inconsistent with those assumed in the questions; and this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases: secondly, because I have heard no argument at your lordship's bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and extent of questions which might be raised in argument: and, thirdly, from a fear, of which I cannot divest myself, that, as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For these reasons, I should have been glad if my learned brethren would have joined me in praying your lordships to excuse us from answering these questions: but, as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

The first question, as I understand it, is, in effect, what is the law respecting alleged crime, when at the time of the commission of it the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for the solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding; and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Secondly, the questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial the question commonly is, whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting

them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Thirdly, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourthly, the answer which I have given to the first question is applicable to this.

Fifthly, whether a question can be asked, depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence; and, as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of *The Queen* v. *M'Naughten*, tried at the central criminal court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very highest authority of these judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of parliament.

Tindal, C. J.—My lords, her majesty's judges, with the exception

of Mr. Justice Maule, who has stated his opinion to your lordships, in answering the questions proposed to them by your lordships' house, think it right, in the first place, to state, that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and, as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing arguments of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and, as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

The first question proposed by your lordships is this, "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law—by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with a crime (murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And, as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on

these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this:—"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, viz., that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your lordships is:—"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?" In answer thereto, we state to your lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

Cases of insanity caused by intoxication.] Intoxication is no excuse for the commission of crime. The prisoner, after a paroxysm of

drunkenness, rose in the middle of the night, and cut the throats of his father and mother, ravished the servant-maid in her sleep, and afterwards murdered her. Notwithstanding the fact of his drunkenness, he was tried and executed for these offences. *Dey's case*, 3 *Paris & Fonbl. M. J.* 140 (*n*). There are many men, it is said in an able work on medical jurisprudence, soldiers who have been severely wounded in the head, especially, who well know that excess makes them mad; but if such persons wilfully deprive themselves of reason, they ought not to be excused one crime by the voluntary perpetration of another. 3 *Paris & Fonbl. M. J.* 140. But if, by the long practice of intoxication, an habitual or fixed insanity is caused, although this madness was contracted voluntarily, yet the party is in the same situation with regard to crimes, as if it had been contracted involuntary at first, and is not punishable. 1 *Hale, P. C.* 32.

Though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the question is, whether an act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration. *Per Holroyd, J.*, *Grindley's case*, 1 *Russ. by Grea.* 8. And where the prisoner was tried for attempting to commit suicide, and it appeared that at the time of the alleged offence she was so drunk that she did not know what she did, Jervis, C. J., held that negatived the attempt to commit suicide. *Moore's case*, 3 *C. & K.* 319.

COERCION BY HUSBAND.

In certain cases a married woman is privileged from punishment, upon the ground of the actual or presumed command and coercion of her husband compelling her to the commission of the offence. But this is only a presumption of law, and if it appears upon the evidence, that she did not in fact commit the offence under compulsion, but was herself a principal actor and inciter in it, she must be found guilty. 1 *Hale, P. C.* 516. In one case it appears to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. *Dick's case*, 1 *Russ. by Grea.* 19. Upon an indictment against a man and his wife for putting off forged notes, where it appeared that they went together to a public-house to meet the person to whom the notes were to be put off, and that the woman had some of them in her pocket, she was held entitled to an acquittal. *Atkinson's case*, 1 *Russ. by Grea.* 19.

Evidence of reputation and cohabitation is in these cases sufficient evidence of marriage. *Ibid.* But where the woman is not described in the indictment as the wife of the man, the *onus* of proving that she is so, rests upon her. *Jones's case*, *Kel.* 37; 1 *Russ by Grea.* 24.

But where on the trial of a man and woman it appeared by the evidence, that they addressed each other as husband and wife, and passed as such, and were so spoken of by the witnesses for the prosecution; Patteson, J., held that it was for the jury to say whether they were satisfied that they were in fact husband and wife, even though the woman had pleaded to the indictment, which described her as a "single woman." *Woodward's case*, 8 *C. & P.* 561. See also *Good's case*, 1 *C. & K.* 185.

The presumption of coercion on the part of the husband does not arise, unless it appear that he was present at the time of the offence committed. 1 *Hale, P. C.* 45. Thus where a wife by her husband's order and procurement, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money, all the judges held, that the presumption of coercion at the time of uttering did not arise, and that the wife was properly convicted of uttering, and the husband of procuring. *Morris's case*, *Russ. & Ry.* 270.

So where the husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *Hammond's case*, 1 *Leach*, 447.

The prisoner, Martha Hughes, was indicted for forging and uttering bank of England notes. The witness stated that he went to the shop of the prisoner's husband, where she took him into an inner room, and sold him the notes; that while he was putting them into his pocket the husband put his head in and said, "Get on with you." On returning to the shop he saw the husband, who, as well as the wife, desired him to be careful. It was objected, that the offence

was committed under coercion, but Thompson, B., thought otherwise. He said, the law out of tenderness to the wife, if a felony be committed in the presence of her husband, raises a presumption, *primâ facie*, and *primâ facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion, but it was absolutely necessary in such case that the husband should be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed, in consequence of a previous communication with the husband that the witness applies to the wife, but she is ready to deal, and has, on her person, the articles which she delivers to the witness. There was a putting off before the husband came, and it is sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done; but when the crime has been completed in his absence, no subsequent act of his (though it might possibly make him an accessary to the felony of the wife), can be referred to what was done in his absence. *Hughes's case*, 1 *Russ. by Grea.* 21; 2 *Lew. C. C.* 229. But where on an indictment against a woman for uttering counterfeit coin it appeared, that the husband accompanied her each time to the door of the shop, but did not go in, Bayley, J., thought it a case of coercion. *Conolly's case*, 2 *Law. C. C.* 229; *Anon. Math. Dig. C. L.* 262, *S. C.*

Where husband and wife were convicted on a joint indictment for receiving stolen goods, it was held, that the conviction of the wife was bad. *Archer's case*, 1 *Moo. C. C.* 143, *ante*, 859; *Matthews's case*, 1 *Den. C. C. R.* 596. And where stolen goods are found in a man's house, and his wife in his presence makes a statement exonerating him and criminating herself, it appears that with respect to the admissibility of this statement against her the doctrine of presumed coercion may apply. *Laugher's case*, 2 *C. & K.* 225. And see *Brooks's case*, 1 *Dears. C. C. R.* 184, *ante*, p. 859.

There are various crimes, from the punishment of which the wife shall not be privileged on the ground of coercion, such as those which are *mala in se*, as treason and murder. 1 *Hale, P. C.* 44, 45; *Manning's case*, 2 *C. & K.* 903. "Some of the books also except robbery." *Per Patteson, J., Cruse's case*, 8 *C. & P.* 545; *S. C.* 2 *Moo. C. C.* 54, *infra.* The learned judge afterwards said, "It may be, that in cases of felony, committed with violence, the doctrine of coercion does not apply."

In the above case, where a husband and wife were indicted under the 7 Wm. 4 & 1 Vict. c. 85, s. 2, for the capital offence of inflicting an injury dangerous to life; Patteson, J., seemed of opinion, that as the wife took an active part in the transaction, she might be found guilty of the offence with her husband, but said he would reserve the point, if upon further consideration he thought it necessary. The prisoners, however, were acquitted of the felony and convicted of an assault.

See also *R.* v. *Mary Buncombe*, 1 *Cox, C. C.* 183, where Coleridge, J., expressed his intention, if the prisoner were convicted of reserving this point for the consideration of the judges.

And in offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, the rule with regard to coercion does not exist, as upon an indictment for keeping a disorderly house. *Hawk. P. C. b.* 1, *c.* 1, *s.* 12, *ante*, p. 781, or gaming house. *Dixon's case*, 10 *Mod.* 336.

And the prevailing opinion is said to be, that the wife may be found

guilty with the husband in all misdemeanors. *Arch. C. L.* 17, 10*th ed.*; 4 *Bl. Com. by Ryland*, 29 (*n*); *Ingram's case*, 1 *Salk.* 384.

But where a husband and wife were jointly indicted for a misdemeanor in uttering counterfeit coin, and it appeared that the wife uttered the base money in the presence of her husband; Mirehouse, C. S. (after consulting Bosanquet and Coltman, JJ.) held that she was entitled to an acquittal. *Price's case*, 8 *C. & P.* 19; and see *Conolly's case*, *ante*, p. 941, which was also a case of misdemeanor; see also 8 *C. & P.* 21 *n.* (*b*).

However, in *Cruse's case*, *ante*, p. 941, where the jury convicted a husband and wife of an assault, under the 7 Wm. 4 & 1 Vict. c. 85, s. 11; the judges on a case reserved affirmed the conviction, being unanimously of opinion, that the point with respect to the coercion of the wife did not arise, as the ultimate result of the case was a conviction for misdemeanor.

Where the wife is to be considered as merely the servant of her husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Thus where the husband and wife were indicted for the murder of an apprentice of the husband, who had died for want of proper nourishment, Lawrence, J., held that the wife could not be convicted, for, though equally guilty *in foro conscientiæ*, yet, in point of law, she could not be guilty of not providing the apprentice with sufficient food. *Squire's case*, 1 *Russ. by Grea.* 19; see further, *ante*, p. 707.

A woman cannot be indicted as an accessary by rescuing her husband. 1 *Hale, P. C.* 47. Nor can she be guilty of larceny in stealing her husband's goods, 1 *Hale, P. C.* 514, *ante*, p. 583. But if she and a stranger steal the goods, the stranger is liable. *Tolfree's case*, 1 *Moo. C. C.* 243; see further, *ante*, p. 583. So it has been held, that she was not guilty of arson within the 7 & 8 Geo. 4, c. 30, s. 2, by setting her husband's house on fire. *Marsh's case*, 1 *Moo. C. C.* 182, *ante*, p. 272.

APPENDIX.

As the recent statutes, 14 & 15 Vict. c. 19, 14 & 15 Vict. c. 100, 16 & 17 Vict. c. 99, and 18 & 19 Vict. c. 126, are frequently referred to in practice, it has been considered useful, besides the references which have been made to their provisions in the body of the work, to insert those statutes here *in extenso*.

14 & 15 VICT., c. 19.

AN ACT FOR THE BETTER PREVENTION OF OFFENCES. [3rd July, 1851.]

Whereas it is expedient to make further provision for the prevention of burglary and other offences in the night: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: that

Any person found by night armed, &c. with intent to break into any house and commit any felony therein, or having in his possession, without lawful excuse, any implements of housebreaking, or having his face disguised, or being found by night in any house with intent to commit any felony therein, shall be guilty of a misdemeanor.

I. If any person shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever with intent to break or enter into any dwelling-house or other building whatsoever and to commit any felony therein, or if any person shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock, key, crow, jack, bit, or other implement of housebreaking, or if any person shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or if any person shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned, with or without hard labour, for any term not exceeding three years.

Any person convicted of such misdemeanor after a previous conviction of

II. If any person shall be convicted of any such misdemeanor as aforesaid committed after a previous conviction, either for felony or such misdemeanor as aforesaid, such person shall on such subsequent conviction be liable, at the discretion of the court, to be transported beyond the seas for any term not less than seven years and not exceeding ten years, or imprisoned, with or without hard labour, for any term not exceeding three years; and in any indictment for such misdemeanor committed after a previous conviction

felony or such misdemeanor, guilty of misdemeanor, &c.

Form of indictment.

Certificate of previous conviction.

as aforesaid, it shall be sufficient to state that the offender was at a certain time and place convicted of felony or misdemeanor against "The Act for the better Prevention of Offences, 1851," (as the case may be,) without otherwise describing the previous felony or misdemeanor; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings, and no more, shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.

Persons using chloroform, &c. in order to commit a felony, guilty of felony.

III. And whereas it is expedient to make further provision for the punishment of persons using chloroform or other stupifying things in order the better to enable them to commit felonies: Be it enacted, that if any person shall unlawfully apply or administer, or attempt to apply or administer to any other person any chloroform, laudanum, or other stupifying or overpowering drug, matter, or thing, with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or other person in committing any felony, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported for life or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

Persons inflicting grievous bodily harm guilty of a misdemeanor, and liable to three years imprisonment.

IV. And whereas it is expedient to make further provision for the punishment of aggravated assaults: Be it enacted, that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned, with or without hard labour, for any term not exceeding three years: Provided however, that nothing herein contained shall be deemed or taken to repeal the provisions of the twenty-ninth section of the Act passed in the tenth year of the reign of his late Majesty King George the Fourth, chapter thirty-four.

Not to repeal sect. 29 of 10 Geo. 4, c. 34.

of any indictment for feloniously cutting, &c. the jury may acquit of the felony, and convict of unlawfully cutting, &c.

V. If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted

upon an indictment for the misdemeanor of cutting, stabbing, or wounding.

VI. If any person shall wilfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall wilfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall wilfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall wilfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall wilfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, or to endanger the safety of any person travelling or being upon such railway, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

Persons wilfully placing wood, &c. on railways, taking up rails, &c. turning machinery, or showing signals, &c. with intent to commit injuries to railway or endanger the safety of persons, guilty of felony.

VII. If any person shall wilfully and maliciously cast, throw, or cause to fall or strike against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage, or truck, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

If any person shall cast any wood, &c. upon any railway carriage with intent to endanger the safety of any person therein, such person to be guilty of felony, &c.

VIII. If any person shall wilfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, dock, canal, or other navigation, every such person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years.

Any person wilfully setting fire to any railway station, &c. guilty of felony.

IX. And whereas provision is made in a certain Act of Parliament passed in the twelfth year of the reign of her present Majesty Queen Victoria, intituled "An Act to amend the Laws in England and Ireland relative to Larceny and other offences connected therewith," and also in this

Upon the trial of persons for subsequent offences under the 12 & 13 Vict. c. 11,

and this Act, the previous conviction not to be stated to the jury or given in evidence until after a verdict of guilty of the subsequent offence, unless the defendant gives evidence of good character.

Act, for the more exemplary punishment of persons who shall commit certain offences after one or more previous conviction or convictions for the like or other offences, and it is expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: Be it enacted, that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and whenever in any indictment any previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid: Provided that, if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

Any person may apprehend persons committing offences against this Act, and convey them before a justice.

X. It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any offence against the provisions of this Act, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

Any person may apprehend persons committing indictable offences in the night, and convey them before a justice.

XI. And whereas doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night: for remedy thereof, Be it enacted, that it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

Any person assaulting a person entitled to apprehend him to be guilty of a misdemeanor.

XII. If any person liable to be apprehended under the provisions of this Act shall assault or offer any violence to any person by law authorised to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years.

The night, in offences against this Act, to be as in burglary.

XIII. The time at which the night shall commence and conclude in any offence against the provisions of this Act shall be the same as in cases of burglary.

Costs of prosecutions.

XIV. In all prosecutions for any offence against the provisions of this Act, it shall be lawful for the court before which any such offence shall be prosecuted or tried to allow the expenses of the prosecution in all respects as in cases of felony.

Nothing in this Act to

XV. Nothing in this Act contained shall be deemed to repeal wholly or in part the fifth of George the Fourth,

chapter eighty-three, intituled "An Act for the Punishment of idle and disorderly Persons and Rogues and Vagabonds, in that part of Great Britain called England," but no person shall be liable to be punished for the same offence both under the said last-mentioned Act and under this Act. repeal 5 Geo. 4, c 83.

XVI. Nothing in this Act shall extend to Scotland. Not to extend to Scotland.

14 & 15 VICT., c. 100.

AN ACT FOR FURTHER IMPROVING THE ADMINISTRATION OF CRIMINAL JUSTICE. [7th August, 1851.]

Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for

The court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury.

the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable: and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius the order for the amendment shall be endorsed on the Postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that, in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed; Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

Verdicts and judgments valid after amendments.

II. Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

Records to be drawn up in amended form, without noticing the amendments.

III. If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

The means by which the injury was inflicted

IV. In any indictment for murder or manslaughter preferred after the coming of this Act into operation, it shall not be necessary to set forth the manner in which or the

means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased. need not be specified in indictments for murder and manslaughter.

V. In any indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. Forms of indictment in cases of forgery and uttering, stealing, and embezzling, or obtaining by false pretences.

VI. In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing. In engraving plates, &c.

VII. In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof. In other cases.

VIII. From and after the coming of this Act into operation, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud. Intent to defraud particular persons need not be alleged or proved in cases of forgery, uttering, or false pretences.

IX. And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: for remedy thereof, Be it enacted, that if on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to A party indicted for felony or misdemeanor may be found guilty of an attempt to commit the same, and shall be liable to the

same consequences as if charged with and convicted of the attempt only.

be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

No person so tried to be afterwards prosecuted for the same.

Repeal of the 11th section of 7 Will. 4 & 1 Vict. c. 85.

X. And whereas it is enacted by a certain Act of Parliament passed in the first year of the reign of her present Majesty Queen Victoria, intituled "An Act to amend the Laws relating to Offences against the Person," that "on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding:" and whereas great difficulties have arisen in the construction of such enactment: for remedy thereof, Be it enacted, that the said enactment shall be, and the same is, hereby repealed.

On the trial of an indictment for robbery the jury may convict of an assault with intent to rob:

XI. If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

no person so tried to be afterwards prosecuted for the same.

Person tried for misdemeanor not to be acquitted if the offence turn out to be felony, unless the court so direct.

XII. If upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

Person indicted for embezzlement as a clerk, &c. not to be acquitted if the offence turn out to

XIII. If upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is

not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

be larceny, and vice versâ.

XIV. If upon the trial of two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property.

Upon an indictment for jointly receiving, persons guilty of separately receiving may be convicted.

XV. And whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessaries to such felony or receivers at different times of stolen property the subject of such felony may be in custody or amenable to justice: for the prevention of several trials, Be it enacted, that any number of such accessaries or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

Separate accessaries and receivers may be included in the same indictment in the absence of the principal felon.

XVI. It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.

Three larcenies from the same person within six months may be included in the same indictment.

XVII. If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

Where a single taking is charged, the prosecutor not required to elect, unless it appear that there were more than three takings, or more than six months between the first and last taking.

XVIII. In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient

Coin and bank-notes

may be described simply as money.

to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved, and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Certain provisions of 23 Geo. 2, c. 11, and 31 Geo. 3, (I.) extended.

XIX. Whereas by an Act of Parliament passed in England in the twenty-third year of the reign of his late Majesty King George the Second, intituled "An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual;" and by a certain other Act of Parliament made in Ireland in the thirty-first year of the reign of his late Majesty King George the Third, intituled "An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual, and for affirming the Jurisdiction of the Quarter Sessions in cases of Perjury," certain provisions were made to prevent persons guilty of perjury and subornation of perjury from escaping punishment by reason of the difficulties attending such prosecutions: and whereas it is expedient to amend and extend the same: Be it enacted, that it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder or deputy-recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy-judge of any county court or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the

Any court, judge, justice, &c. may direct a person guilty of perjury in any evidence, &c. to be prosecuted,

and commit the party, unless he enter into recognizance to appear and take his trial, and bind persons to give evidence;

court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall, and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland such sum as shall be so allowed, shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised and levied in Ireland: Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

and give certificate of prosecution being directed, which shall be sufficient evidence of the same.

XX. In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Extending the 23 Geo. 2, c. 11, s. 1, to other offences, and simplifying indictments for perjury and other like offences.

XXI. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner herein-before mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things herein-before rendered

Extending the 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.

unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

On trials for perjury and subornation a certificate of the trial of the indictment on which the perjury was committed sufficient evidence of such trial.

XXII. A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer, (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken,) shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

Venue in the margin sufficient, except where local description is necessary.

XXIII. It shall not be necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: Provided that, in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

What defects shall not vitiate an indictment.

XXIV. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or *vice versâ*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

Formal objections to indictments shall be taken before jury are sworn.

XXV. Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment

to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

Court may amend any formal defect.

XXVI. So much of a certain Act of Parliament passed in the sixtieth year of the reign of his late Majesty King George the Third, intituled "An Act to prevent Delay in the Administration of Justice in cases of Misdemeanor," as provides that "where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within that part of Great Britain called England, or in Ireland, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon, at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of certiorari for removing such indictment into his Majesty's court of King's Bench at Westminster or in Dublin shall be delivered at such session before the jury shall be sworn for such trial," shall be and the same is hereby repealed.

Repealing part of 60 Geo. 3, & 1 Geo. 4, c. 4, as to the traverse of indictments in cases of misdemeanor.

XXVII. No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: Provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session, without entering into any fresh recognizance for that purpose.

Provision as to traversing indictments.

XXVIII. In any plea of autrefois convict or autrefois acquit it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.

Provision as to plea of autrefois convict or autrefois acquit.

XXIX. Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by

Punishment for certain indictable misdemeanors.

law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Interpretation of terms.

XXX. In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any Nisi Prius record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment;" and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

Commencement of Act.

XXXI. This Act shall come into operation on the first day of September, One thousand eight hundred and fifty-one.

Not to extend to Scotland.

XXXII. Nothing in this Act shall extend to Scotland.

16 & 17 VICT., c. 99.

[20th August, 1853.]

AN ACT TO SUBSTITUTE, IN CERTAIN CASES, OTHER PUNISHMENT IN LIEU OF TRANSPORTATION.

Whereas by reason of the difficulty of transporting offenders beyond the seas it has become expedient to substitute, in certain cases, other punishment in lieu of transportation: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

No person to be sentenced to transportation, except for life or for 14 years or upwards.

I. After the commencement of this Act no person shall be sentenced to transportation who, if this Act had not been passed, would not have been liable to be transported for life, or for a term of fourteen years or upwards; and no person shall be sentenced to transportation for any term less than fourteen years.

Sentence of penal servitude instead of transportation for less than 14 years.

II. Any person who, if this Act had not been passed, might have been sentenced to transportation for a term of less than fourteen years shall be liable, at the discretion of the court, to be kept in penal servitude for such term as herein-after mentioned.

Persons liable to transportation for 14 years or upwards or for life

III. Any person who, if this Act had not been passed, might have been sentenced to transportation for a term of fourteen years or upwards or for life shall, after the commencement of this Act, be liable, at the discretion of the court, to be sentenced either to such transportation for

fourteen years or upwards or for life, or to be kept in penal servitude for such term as under this Act may be awarded instead of such transportation.

may still be sentenced to transportation, or to penal servitude instead.

IV. The terms of penal servitude to be awarded instead of the transportation to which any offender would have been liable if this Act had not been passed shall be as follows; (that is to say,)

Terms of penal servitude which are to be awarded instead of the present terms of transportation.

Instead of transportation for seven years or for a term not exceeding seven years, penal servitude for the term of four years:

Instead of any term of transportation exceeding seven years and not exceeding ten years, penal servitude for any term not less than four and not exceeding six years:

Instead of any term of transportation exceeding ten years and not exceeding fifteen years, penal servitude for any term not less than six and not exceeding eight years:

Instead of any term of transportation exceeding fifteen years, penal servitude for any term not less than six and not exceeding ten years:

Instead of transportation for the term of life, penal servitude for the term of life:

And in every case where, at the discretion of the court, one of any two or more of the terms of transportation herein-before mentioned might have been awarded, the court shall have the like discretion to award one of the two or more terms of penal servitude herein-before mentioned in relation to such terms of transportation.

V. Whenever her Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time being, shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years or for life, such intention of mercy shall have the same effect and may be signified in the same manner, and all courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, as in the cases where her Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time being, is or are now pleased to extend mercy upon condition of transportation beyond seas, the order for the execution of such punishment as her Majesty, or the lord lieutenant or other chief governor or governors of Ireland for the time being, may have made the condition of her, his, or their mercy being substituted for the order for transportation.

Conditional pardons to be allowed with reference to the substituted punishment, as in cases of pardons on condition of transportation.

VI. Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, fort, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of her Majesty's principal Secretaries of State may from

Persons under sentence or order of penal servitude how to be dealt with.

time to time direct; and such person may during such term be kept to hard labour and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.

All Acts, &c., concerning convicts sentenced to transportation made applicable for the purposes of this Act.

VII. All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Act of the fifth year of King George the Fourth, chapter eighty-four, authorizing the appointment by her Majesty, from time to time, of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorizing her Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labour in any part of her Majesty's dominions out of England, shall extend and be applicable to and for the appointment by her Majesty of like places of confinement in any part of the United Kingdom for offenders (whether male or female) sentenced under this Act in any part of the United Kingdom, and to and for the ordering of such offenders to be kept to hard labour in any part of her Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in or out of England, appointed under the said Act, of the offenders therein mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, treatment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act, of the offender sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offenders to be confined therein.

Powers of Secretary of State to be exercised in Ireland by lord lieutenant.

VIII. Provided always, that all the powers vested under this Act, expressly or by reference to any other Act, in one of her Majesty's principal Secretaries of State, shall in relation to places of confinement in Ireland, or where such powers are otherwise to be exercised in Ireland, be exercised by the lord lieutenant or other chief governor or governors of Ireland; and where the signature of one of her Majesty's principal Secretaries of State would be necessary in relation to the exercise of such powers, the signature of such lord lieutenant or chief governor or governors, or his or their chief secretary, shall be sufficient in the case of the exercise of such powers by such lord lieutenant or chief governor or governors.

Her Majesty may grant licences to be at large

IX. It shall be lawful for her Majesty, by an order in writing under the hand and seal of one of her Majesty's principal Secretaries of State, to grant to any convict now

under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a licence to be at large in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of transportation or imprisonment, and upon such conditions in all respects as to her Majesty shall seem fit; and it shall be lawful for her Majesty to revoke or alter such licence by a like order at her Majesty's pleasure.

to convicts under sentence of transportation.

Holder of licence not to be imprisoned, &c., by reason of his sentence.

X. So long as such licence shall continue in force and unrevoked, such convict shall not be liable to be imprisoned or transported by reason of his or her sentence, but shall be allowed to go and remain at large according to the term of such licence.

If licence revoked, the convict may be apprehended and committed to prison.

XI. Provided always, that if it shall please her Majesty to revoke any such licence as aforesaid, it shall be lawful for one of her Majesty's principal Secretaries of State, by warrant under his hand and seal, to signify to any one of the police magistrates of the metropolis that such licence has been revoked, and to require such magistrate to issue his warrant under his hand and seal for the apprehension of the convict to whom such licence was granted, and such magistrate shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same shall be delivered for that purpose in any part of the United Kingdom, or in the isles of Jersey, Guernsey, Alderney, or Sark, and shall have the same force and effect in all the said places as if the same had been originally issued or subsequently endorsed by a justice of the peace or magistrate, or other lawful authority having jurisdiction in the place where the same shall be executed; and such convict when apprehended under such warrant shall be brought, as soon as he conveniently may be, before the magistrate by whom the said warrant shall have been issued, or some other magistrate of the same court, and such magistrate shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the prison or place of confinement from which he was released by virtue of the said licence, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his or her original sentence, and shall undergo the residue thereof as if no such licence had been granted.

Persons convicted of larceny after previous conviction for felony not to be transported.

XII. No person shall, after the commencement of this Act, be liable to be transported by reason only of a conviction for larceny after a previous conviction for felony, but every such person so convicted may be punished by penal servitude for any term not less than four years and not more than ten years.

Queen's prerogative.

XIII. Provided always, that nothing in this Act contained shall in any manner affect her Majesty's royal prerogative of mercy, or any prerogative of mercy vested in the lord lieutenant or other chief governor or governors of Ireland for the time being.

Discretion

XIV. Provided also, that nothing herein contained shall

of courts as to alternative punishments not to be affected.

interfere with or affect the authority or discretion of any court in respect of any punishment which such court may now award or pass on any offender other than transportation, but where such other punishment may be awarded at the discretion of the court, instead of transportation, or in addition thereto, the same may be awarded instead of or (as the case may be) in addition to the punishment substituted for transportation under this Act.

Transportation to include banishment.

XV. For the purposes of this Act, the term "transportation" shall include banishment beyond the seas.

Commencement of Act.

XVI. This Act shall commence from and after the first day of September, One thousand eight hundred and fifty-three.

18 & 19 VICT., c. 126.

[14th August 1855.]

AN ACT FOR DIMINISHING EXPENSE AND DELAY IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN CERTAIN CASES.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Power to justices at petty sessions to punish persons charged with larceny, &c., summarily.

1. Where any person is charged before any justices of the peace assembled at such petty sessions as herein-after provided, with having committed simple larceny, and the value of the whole of the property alleged to have been stolen does not, in the judgment of such justices, exceed five shillings, or with having attempted to commit larceny from the person, or simple larceny, it shall be lawful for such justices to hear and determine the charge in a summary way; and if the person charged shall confess the same, or if such justices, after hearing the whole case for the prosecution and for the defence, shall find the charge to be proved, then it shall be lawful for such justices to convict the person charged, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any period not exceeding three calendar months; and if they find the offence not proved they shall dismiss the charge, and make out and deliver to the person charged a certificate under their hands, stating the fact of such dismissal; and every such conviction and certificate respectively may be in the forms (A.) and (B.) in the Schedule to this Act, or to the like effect: Provided always, that if the person charged do not consent to have the case heard and determined by such justices, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude, or if such justices be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment rather

If parties accused do not consent, justices to deal with cases as if this Act had not passed.

than to be disposed of summarily, such justices shall, instead of summarily adjudicating thereon, deal with the case in all respects as if this Act had not been passed: Provided also, that if upon the hearing of the charge such justices shall be of opinion that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the person charged, without proceeding to a conviction.

Justices to ask the accused whether he consents to the charge being summarily determined.

II. Where the justices before whom any person is charged as aforesaid propose to dispose of the case summarily under the foregoing provisions, one of such justices, after the examinations of all the witnesses for the prosecution have been completed, and before calling upon the person charged for any statement which he may wish to make, shall state to such person the substance of the charge against him, and shall then state to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by us, or do you desire that it shall be sent for trial by a jury at the sessions or assizes?" (as the case may be); and if the person charged shall consent to the charge being summarily tried and determined as aforesaid, then the justices shall reduce the charge into writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge; and if such person shall say that he is guilty, the justices shall then proceed to pass such sentence upon him as may by law be passed, subject to the provisions of this Act in respect to such offence; but if the person charged shall say that he is not guilty, the justices shall then inquire of such person whether he has any defence to make to such charge, and if he shall state that he has a defence the justices shall hear such defence, and then proceed to dispose of the case summarily.

Persons charged with larceny, &c., may plead guilty before justices in petty sessions, and be sentenced forthwith.

III. Where any person is charged before any justices at such petty sessions as aforesaid with simple larceny (the property alleged to have been stolen exceeding in value five shillings), or stealing from the person, or larceny as a clerk or servant, and the evidence, when the case on the part of the prosecution has been completed, is in the opinion of such justices sufficient to put the person charged on his trial for the offence with which he is charged, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act, shall reduce the charge into writing, and shall read it to the said person, and shall then ask him whether he is guilty or not of the charge; and if such person shall say that he is guilty such justices shall thereupon cause a plea of guilty to be entered upon the proceedings, and shall convict him of such offence, and commit him to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding six calendar months; and every such conviction may be in the form (C.) in the schedule to this Act, or to the like effect: Provided always, that the said justices, before they ask such person whether he is guilty or not, shall explain to him that he is not obliged to plead or answer before them at all, and that if he do not plead or

Justices to warn the accused that he is not obliged to plead.

answer before them he will be committed for trial in the usual course.

Persons accused may have assistance of counsel, &c.

IV. In every case of summary proceeding under this Act the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

Power to remand persons charged to next petty sessions.

V. Where any person is charged before any justice or justices with any offence mentioned in this Act, and in the opinion of such justice or justices the case may be proper to be disposed of by justices in petty sessions under this Act, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination to the next petty sessions, in like manner in all respects as a justice or justices are authorised to remand a party accused under the Act passed in the session holden in the eleventh and twelfth years of her Majesty, chapter forty-two, section twenty-one, or under the Petty Sessions Act (Ireland), 1851, section fourteen.

Forfeited recognizances to be transmitted to the clerk of the peace.

VI. If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorised under the last-mentioned Act to take on the remand of a party accused do not afterwards appear pursuant to such recognizance, then the justices before whom he ought to have appeared shall certify (under the hands of two of them) on the back of the recognizance, to the clerk of the peace of the county or place, the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *primâ facie* evidence of such non-appearance.

Convictions and other proceedings to be returned to the quarter sessions.

VII. The justices adjudicating under this Act shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of the witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of general or quarter sessions for the county or place, there to be kept by the proper officer among the records of the court; and a copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceeding whatever.

Justices may order restitution of property.

VIII. It shall be lawful for the justices by whom any person is convicted under this Act to order restitution of the property stolen, taken, or obtained by false pretences, in those cases in which the court before whom the person convicted would have been tried but for this Act may be by law authorised to order restitution.

Petty sessions to be an open court, and held for petty sessional division.

IX. Every petty sessions for the purposes of this Act shall be an open public court, and shall be the petty sessions holden for a petty sessional division; and a written or printed notice of the days and hours for holding such petty sessions shall be posted or affixed by the clerk to the justices of petty sessions upon the outside of some conspicuous part of the building or place where the same are held

11 & 12 Vict. c. 43, not to

X. The provisions of the Act of the session holden in the

eleventh and twelfth years of her Majesty, chapter forty-three, shall not be construed as applying to any proceeding under this Act.

apply to proceedings under this Act.

Effect of conviction.

XI. Every conviction by justices in petty sessions under this Act shall have the same effect as a conviction upon indictment for the same offence would have had, save that no conviction under this Act shall be attended with any forfeiture.

Proceedings under this Act a bar to further proceedings.

XII. Every person who obtains a certificate of dismissal or is convicted under this Act shall be released from all further or other criminal proceedings for the same cause.

No conviction to be quashed for want of form.

XIII. No conviction, sentence, or proceeding under this Act shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there be a good and valid conviction to sustain the same.

Justices may order payment of expenses.

XIV. Where any charge is summarily adjudicated upon under this Act, or an offender is under this Act convicted by justices in petty sessions upon a plea of "guilty," it shall be lawful for the justices by whom such charge has been adjudicated upon or offender convicted, upon the request of any person who has preferred the charge or appeared to prosecute or give evidence against the person charged, if such justices think fit so to do, to grant a certificate to such person of the amount of the compensation which such justices may deem reasonable for his expenses, trouble, and loss of time therein, subject nevertheless to the regulations made, or to be made, as hereinafter mentioned; and every such certificate shall, when granted in England, have the effect of an order of court for the payment of the expenses of a prosecution made under the Act of the seventh year of King George the Fourth, chapter sixty-four, and the Acts amending the same, and when granted in Ireland shall have the effect of an order of court for the payment of the expenses of a prosecution made under the Act of the fifty-fifth year of King George the Third, chapter ninety-one, and the Acts amending the same; and the amount mentioned in such certificate shall be paid in like manner as the money mentioned in such order of court; and all certificates to be granted under this Act shall be subject to the like regulations made or to be made in relation thereto as the certificates mentioned in the said Act of the seventh year of King George the Fourth to be granted by examining magistrates are or may be subject to under the Act of the session holden in the fourteenth and fifteenth years of her Majesty, chapter fifty-five: Provided also, that the amount of the fees payable to the clerks of the magistrates in petty sessions, in respect of any proceeding under this Act, and of the fees payable to the clerks of the peace for filing the depositions, conviction, or certificate of dismissal aforesaid, and of all such expenses of apprehending the person charged, and detaining him in custody, and of such other expenses as are now by law payable when incurred before a commitment for trial

may be added to the certificate for compensation aforesaid, and paid in the like manner.

Town-hall, court-house, &c., of county, city, or borough may be used for petty sessions held under this Act.

XV. In every city, borough, town, or place in England where any petty sessions shall be holden under this Act, the town-hall, court-house, or other public building therein, belonging to any county, city, borough, town, or place, or any court-house in such city, borough, town, or place provided by the commissioners of her Majesty's Treasury, under the Act of the session holden in the ninth and tenth years of her Majesty, chapter ninety-five, may be used for the purpose of holding such petty sessions, without any charge for rent or other payment, save and except the reasonable and necessary charges for lighting, warming, and cleaning, when such public building is used for the purpose of holding such courts of petty sessions, and for all other expenses necessarily incidental to the use of the said building for the purposes of the said courts: Provided always, that the necessary arrangements shall be made so that the sittings of the said courts of petty sessions shall not interfere with the business of the county, city, borough, town, or place, or other business usually transacted in such town-hall, court-house, or other public building, or any purpose for which any such town-hall, court-house, or other public building may be used by virtue of any Act of Parliament in that behalf.

Any metropolitan police magistrate or stipendiary magistrate may act alone.

XVI. Any one of the magistrates appointed to act at any of the police courts of the metropolis, and sitting at a police court within the metropolitan police district, or any magistrate appointed to act at the police courts of the Dublin metropolitan district, and sitting at a police court within the said district, or any stipendiary magistrate appointed for any city, town, liberty, borough, or district, and sitting at a police court or other place appointed in that behalf, may, in the case of persons charged before such magistrate, do alone all acts by this Act authorised to be done by justices of the peace in petty sessions, and all the provisions of this Act referring to justices in petty sessions shall be read and construed as referring also to such magistrate.

Nothing to affect provisions of 10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37.

XVII. Nothing in this Act shall affect the provisions of the Act of the session holden in the tenth and eleventh years of her Majesty, chapter eighty-two, "For the more speedy Trial and Punishment of Juvenile Offenders," or of the Act of the session holden in the thirteenth and fourteenth years of her Majesty, chapter thirty-seven, "For the further Extension of Summary Jurisdiction in cases of Larceny," or of the Summary Jurisdiction (Ireland) Act, 1851; and this Act shall not extend to persons punishable under the said Acts, so far as regards offences for which such persons may be punished thereunder.

As to compensation to clerks of peace and other officers.

XVIII. And whereas the fees and emoluments of clerks of the peace for counties and boroughs, and of other officers of the courts of quarter sessions, in criminal proceedings, may be seriously diminished by the operation and effect of this Act, and it is just and reasonable that full compensation for any such loss should be made in respect thereof to such clerks of the peace and other officers appointed

before the passing of this Act: Be it enacted, that immediately after the passing of this Act the commissioners of her Majesty's Treasury shall, upon the application of any such clerk of the peace or other officer, by such means and in such manner as they may think proper, inquire into and ascertain the annual amount, to be computed upon an average of five years immediately preceding the passing of this Act, or of such shorter period as such clerk of the peace or other officer shall have been in office, of the fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer; and the said commissioners shall, upon the like application, also ascertain, in such manner as they may think proper, the total amount of fees and emoluments in criminal prosecutions received by such clerk of the peace or other officer during any year after the passing of this Act; and the said commissioners are hereby authorised and empowered, by warrant under their hands, to award to such clerk of the peace or other officer the deficiency, when and so often as the same shall occur, between the last-mentioned amount and the annual average amount so ascertained as aforesaid, and the sum so awarded shall be paid out of any monies which may be provided by parliament for that purpose; provided, that in all cases where any such clerk of the peace, by reason of his being paid by salary, under an order made by virtue of the Act of the session holden in the fourteenth and fifteenth years of her Majesty, chapter fifty-five, shall pay such fees and emoluments as aforesaid to the treasurer of the county or borough for which he is clerk of the peace in aid of the county or borough rate, as the case may be, such deficiency, when so ascertained as aforesaid, shall be paid to the treasurer of such county or borough respectively.

Power to increase salary of chief magistrate to a sum not exceeding 1,500*l.*

XIX. And whereas by section nine of the Act of the session holden in the second and third years of her Majesty, chapter seventy-one, provision is made for payment out of the monies in the hands of the receiver of the metropolitan police district of such salaries as her Majesty shall direct to the magistrates of the police courts of the metropolis, the salary to the chief magistrate not being more than one thousand two hundred pounds, and to each of the other magistrates not more than one thousand two hundred pounds: And whereas after the passing of the said Act the salary of the chief magistrate was fixed at one thousand two hundred pounds, and the salaries of the other police magistrates at one thousand pounds: And whereas the duties of the said chief and other magistrates have increased, and are subject under this Act to be further increased: And whereas the salaries of such other magistrates have, in consequence of such increase of duty, been increased from one thousand pounds to the limit permitted by the said Act, and it is expedient to authorise such increase of the salary of the said chief magistrate as hereinafter mentioned: the salary to be paid out of the monies aforesaid to the said chief magistrate shall be such yearly sum, not exceeding one thousand five hundred pounds, as her Majesty may direct.

Provisions of 15 & 16 Vict. c. 73, for payment by salary in lieu of fees to clerks of assize for their duties as associates extended to the whole office of clerk of assize, &c.

XX. And whereas by the Act of the session holden in the fifteenth and sixteenth years of her Majesty, chapter seventy-three, certain powers were granted and provisions made for the payment to the several clerks of assize of annual sums for salaries, and for the expenses of their office, in respect of their duties as associates, in lieu of the fees and emoluments appertaining to those duties: And whereas it is expedient that the principle of payment by salary in lieu of fees should be further provided for, and that the clerks of assize should be so paid for the performance of all their other duties: Be it therefore enacted, that all fees and emoluments heretofore payable to the clerks of assize for the performance of their duties as clerks of the crown shall be and they are hereby abolished; and all the powers and provisions made by the before-mentioned Act, except as hereinafter provided, for the payment of clerks of assize by salary in lieu of fees, in respect of their duties as associates, shall be and the same are hereby extended and made applicable to the payment of clerks of assize by salary, and the expenses of their offices, in lieu of fees and emoluments for the performance of their duties as clerks of the crown and of all other duties appertaining to the office of clerk of assize: Provided always, that the commissioners of her Majesty's Treasury for the time being shall fix and determine the amount of salary to be allowed to any subordinate officer now employed or who shall hereafter be employed by any clerk of assize, and shall be empowered to order the payment of such salary to the said officers in the first instance, and not through the medium of the clerk of assize: Provided also, that the salaries and expenses of the officers of the said clerks of assize for the whole of their duties on the criminal and civil sides of the court shall be paid out of any monies which may be provided by parliament for that purpose.

So much of 12 Rich. 2, c. 10, and 14 Rich. 2, c. 12, &c., as directs payment of wages to justices and their clerks repealed.

XXI. And whereas by Acts of the twelfth and fourteenth years of King Richard the Second payments are provided for justices of the peace and their clerks in each county, as wages by the day for the time of their sessions, to be payable by the sheriff, as therein mentioned, and in several counties in England sums are claimed from the sheriffs and paid in respect of such statutory wages, and it is expedient that such payments should be discontinued: Be it therefore enacted, that so much of the several Acts of the twelfth year of King Richard the Second, chapter ten, and of the fourteenth year of King Richard the Second, chapter twelve, or of any other Act now in force as directs or authorises the payment of wages to justices of the peace and their clerks for the time of their sessions, shall be repealed.

In cases of injuries to property, parties aggrieved may receive compensation, though examined as witnesses.

XXII. And whereas it is expedient to amend the law as to witnesses in cases of wilful or malicious injuries to property: Be it further enacted, that in all cases where any justice or justices of the peace have or shall hereafter have power to order a sum of money to be forfeited and paid to the party aggrieved, as amends or compensation for any injury to property, real or personal, the right of such party to receive the money so ordered to be paid shall not be affected by such party having been examined as a witness

in proof of the offence, any law or statute to the contrary notwithstanding.

XXIII. In the interpretation of this Act "county" shall be construed to include riding, parts, liberty, and division of a county; "borough" to include city, county of a city or town, and town corporate; "property" to include everything included under the words "chattel, money, or valuable security," as used in the Act of the session holden in the seventh and eighth years of King George the Fourth, chapter twenty-nine; and in the case of any "valuable security" the value of the share, interest, or deposit to which the security may relate, or of the money due thereon or secured thereby, and remaining unsatisfied, or of the goods or other valuable thing mentioned in the warrant or order, shall be deemed to be the value of such security. Interpretation of terms.

XXIV. This Act shall not extend to Scotland. Extent of Act.

SCHEDULE.

Form (A.)

Conviction.

to wit. } Be it remembered, that on the day of in the year of our Lord , at in the said [county], *A. B.*, being charged before us the undersigned of her Majesty's justices of the peace for the said [county], and consenting to our deciding upon the charge summarily, is convicted before us, for that [he the said *A. B.*, *&c.*, *stating the offence, and the time and place when and where committed*]; and we adjudge the said *A. B.* for his said offence to be imprisoned in the [house of correction] at in the said [county], [and there kept to hard labour] for the space of .

Given under our hands and seals, the day and year first above mentioned, at in the [county] aforesaid.

J. S. (L.S.)
H. M. (L.S.)

Form (B.)

Certificate of Dismissal.

to wit. } We of her Majesty's justices of the peace for the [county] of certify, that on the day of in the year of our Lord at in the said [county], *A. B.* being charged before us, and consenting to our deciding upon the

charge summarily, for that [he the said *A. B., stating the offence charged, and the time and place when and where alleged to be committed*], we did, having summarily adjudicated thereon, dismiss the said charge.

Given under our hands and seals, this day of at in the [county] aforesaid.

J. S. (L.S.)
H. M. (L.S.)

FORM (C.)

Conviction upon a Plea of Guilty.

to wit. } BE it remembered, that on the day of in the year of our Lord at in the said [county], *A. B.*, being charged before us, the undersigned of her Majesty's justices of the peace for the said [county], for that [he the said *A. B.*, *&c., stating the offence, and the time and place when and where committed*], and pleading guilty to such charge, he is thereupon convicted before us of the said offence; and we adjudge the said *A. B.* for his said offence to be imprisoned in the [house of correction] at in the said [county], [and there kept to hard labour] for the space of .

Given under our hands and seals, the day and year first above mentioned, at in the [county] aforesaid.

J. S. (L.S.)
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THE END.

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